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Supreme Court of the United States

October Term, 1954
No. 188

Ennis M. Nichols, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and Common Stockholders Committee of Long Island Lighting Company,
Petitioners,

against

Long Island Lighting Company,
Respondent.

Securities & Exchange Commission,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT TO REVIEW A JUDGMENT OF THAT COURT DIRECTING A FINAL DISMISSAL, WITHOUT TRIAL, OF THE COMPLAINT OF THE PETITIONERS, FILED IN A COMMON LAW ACTION FOR FRAUD AND CONSPIRACY IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners are the common stockholders of the Long Island Lighting Company, a New York corporation, numbering approximately eleven thousand on the 1st day of June, 1950, when the United States Court of Appeals for the Second Circuit affirmed an enforcement order of the United States District Court for the Eastern District of New York (*In re Long Island Lighting Co.,* 89 F. Supp. 513, aff'd 183 F. 2d 45, cert. denied 340 U. S. 834), upon the authority of the Public Utility Holding Company Act (sometimes hereinafter referred to as "PUHCA"), under a reorganization ordered by the Securities and Exchange Commission (sometimes hereinafter referred to as "SEC"), under Section 11(e) of that act in which, on application to the SEC, these petitioners were granted what is termed a "limited participation" in the hearings. As a result of this enforcement order, the petitioners' interest in the reorganized company was reduced from 49.7% in the original Long Island Lighting Company, to 5.7% in the reorganized company, at a time when the net earnings of this utilities system had passed four million ($4,000,000.) dollars annually. The petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, finally dismissing, without answer by the defendant or trial of the allegations of the petitioners' complaint, in an action alleging that the PUHCA and the regulations and practices of SEC thereunder had, with premeditation, evidenced by written communications in 1942 and the subsequent employment by the defendant of one of SEC's attorneys, and as such in charge of the reorganization proceeding, who here appears as sole attorney for the defendant, the reorganized Long Island Lighting Company, been used to consummate a conspiracy and accomplish a fraud on the petitioners to their damage in the sum of twenty-seven million five hundred thousand ($27,500.000.) dollars.

The Court of Appeals refused to permit the petitioners to be heard and finally, to the extent of its powers, expelled them from all Federal tribunals and administrative agencies upon the ground that their complaint had already been heard and passed upon in the reorganization proceeding, and applied the rule of *res judicata,* despite the undisputed fact that proof of fraud and conspiracy in the reorganization proceeding was not disclosed, detected or known by these petitioners until more than a year after the completion of the reorganization proceeding by SEC and the courts, and, hence, could not possibly be subject to the rule of *res judicata.*

Opinions Below

The opinions of the United States District Court for the Eastern District of New York are not reported, but are set forth respectively at pages 7 and 8 of this petition. The opinions of the United States Court of Appeals for the Second Circuit are reported respectively in 207 F. 2d 931 and 211 F. 2d 392, and are set forth respectively at pages 27 to 33 and 36 to 37 of the appendix hereto.

Jurisdiction

(i) The judgment of the United States Court of Appeals of which review is sought is dated and was entered on the 22nd day of March, 1954.

(ii) The order denying a rehearing is dated and was entered on the 7th day of April, 1954.

(iii) Jurisdiction to review the aforesaid judgment is conferred by the United States Code, Title 28, Section 1254.

Questions Presented for Review

As we shall later show, by way of argument, there are many collateral and seemingly, to counsel, relevant questions presented in consideration of this petition for certiorari from the judgment of the Court of Appeals finally dismissing on the merits the complaint herein, without the vestige of trial or hearing of its allegations, without requiring the defendant to answer or to submit to examination under the FRCP, and without allowing the petitioners as plaintiffs to present their witnesses, evidence and proof, in any form, at any time, of fraud and conspiracy, directly and explicitly set forth under oath in their complaint. The predominating issue presented is: Can these petitioners be constitutionally denied any right of trial upon the ground of *res judicata* resulting from the reorganization proceedings, where the fraud and conspiracy were at no time before the SEC, for the reason that the fraud and conspiracy were not uncovered or discovered by petitioners until long after the Court of Appeals had finally affirmed the enforcement order in those proceedings and the same had become irrevocably final; or upon the ground that the complaint herein is barred as a collateral attack on said judgment, when, in fact, the finality and non-assailability of that judgment in the reorganization proceedings is the gravemen of the complaint that the PUHCA and the SEC proceedings under it were used to consummate the fraud and conspiracy set forth in the complaint.

To this question there is, of course, the corollary: Can the rights and property of stockholders be taken from them and their corporation dissolved by *force majeure with due process of law* by a statutory proceeding before an administrative agency where they have no *right* to be heard?

Statement of the Case

On the 1st day of June, 1950, the United States Court of Appeals for the Second Circuit affirmed an enforcement order of the United States District Court for the Eastern District of New York (*In re Long Island Lighting Co., supra*) approving the reorganization of Long Island Lighting Company under the PUHCA in proceedings instituted by SEC under Section 11(e) of that act, which have been before this Court at different stages on petitions for certiorari on prior occasions. (*S.E.C.* v. *Long Island Lighting Co.*, 324 U. S. 837, 325 U. S. 833; *Common Stockholders Committee* v. *S.E.C.*, 340 U. S. 834). In its original opinion on appeal by these petitioners from the enforcement order of the District Court, this Court of Appeals reversed the enforcement order and remanded the proceedings, but a few days later, on an extra judicial application by counsel for SEC, and without formal notice to these petitioners, reversed its prior decision and affirmed the enforcement order (*Common Stockholders Committee* v. *S.E.C.*, 183 F. 2d 45).

Thereafter these petitioners moved in the said Court of Appeals to set aside its affirmance on the ground that it had been procured through fraud on the Court. This motion was denied in these words:

> "Petition denied on the ground that no fraud or other basis for relief under Rule 60(b) F.R.C.P. is made to appear." (C. of A., 2d, May 21, 1952, unreported).

Petitioners asked reargument and clarification of this opinion for the reason that they had not moved under said Section 60(b) and could not have done so because of the lapse of time. To this the Court of Appeals responded in the following opinion.

> "Whether petitioners have a right to proceed by motion or independent action in the District Court

> without obtaining leave of this Court is a matter on which we express no opinion." (*In re Long Island Lighting Company,* 197 F. 2d 709, 710).

Thereupon, petitioners instituted a common law action against the Long Island Lighting Company for fraud and conspiracy in the District Court, demanded a jury trial and asking damages of twenty-seven million five hundred thousand ($27,500,000) dollars. Defendant Long Island Lighting Company met this complaint, which was sworn to by the petitioner,. Nichols, with no denial of any of its allegations but with a motion for summary judgment dismissing the complaint and for an order adjudicating the petitioner Nichols and petitioners' counsel Aron in contempt of court. Both motions were denied in the District Court by Senior Judge Inch. SEC, on the return of the Long Island Lighting Company motion for summary judgment, came into court and moved to intervene and to dismiss the complaint on the ground that the bringing of this common law action for fraud and conspiracy was barred by the injunction contained in the enforcement order, reading as follows:

> " * * * and all other persons be, and they are hereby, enjoined and restrained from doing any act or taking any action interfering with, or tending to interfere with, these proceedings or with the enforcement and carrying out of the Amended Plan or any part thereof or compliance with the Order of the Securities & Exchange Commission dated November 16, 1949, or this Order, including the commencement or prosecution of any action, suit or proceeding, at law or in equity, or under any statute, in any court or before any executive or administrative officer, commission or tribunal, other than such proceedings before the Commission or this Court as may be authorized by the Act or the Rules and Regulations promulgated thereunder, and such review, if any, in an appropriate Court of Appeals as may be provided by law."

The District Court, again Chief Judge Inch, granted SEC leave to intervene and dismissed the complaint in the following memorandum:

> "The Securities & Exchange Commission is granted leave to intervene herein, and the motion to dismiss the action on the ground that it violates the order of this Court of February 17, 1950 in Civil Action #10413 is granted, without prejudice to any further proceeding which plaintiffs may desire to undertake, pursuant to the Court's reserved jurisdiction in said action #10413 to vacate or modify said order by reason of the allegations set forth in the complaint herein. Settle order." (*Nichols et al.* v. *Long Island Lighting Company,* E. D. N. Y., unreported, December 30, 1952.)

Petitioners appealed from both orders, that denying Long Island Lighting Company's motion to dismiss and the other granting a similar motion by SEC, petitioners' counsel being unable to determine the effect of this apparent conflict. In their brief on the appeal (at page 8), counsel for the SEC wrote as follows:

> "On the other hand, the procedure, which the order of the Court below leaves open to appellants, if they have stated or can state adequate particulars of fraud, permits the Court to reexamine what is now 'fair and equitable' in the light of whatever fraud, if any, might be established, with due regard for the equities of innocent security holders including both the original participants in the reorganization and those who have dealt in the securities of the reorganized company on the faith of the prior adjudication."

Petitioners, by reply brief (at page 3), instantly responded as follows:

> "This is the first time it has been intimated that any decision or findings by the Commission after trial of the allegations of the complaint, would be subject to review and confirmation by the District Court, sub-

> ject to appeal to this Court. Owing to the unique disposition of the matter in the Court below, we find nothing in the PUHCA providing for such procedure. *If counsel for the commission are in a position thus to bind LILCO as well as the Commission, appellants will join SEC in asking such a disposition of the appeals,* * * *."

The Court of Appeals affirmed in an opinion written by Judge Augustus M. Hand, reading in part as follows; and affirming the order below, *without modification:*

> "For the foregoing reasons we affirm the order of dismissal both because our prior decisions are *res judicata* and as such a bar to the present action, and also because a collateral attack upon a judgment already rendered is not in our opinion permissible. Furthermore, we see no reason under the circumstances why the plaintiffs should be allowed to proceed further on a direct attack against the consolidation decree on the basis of the claims before us because they have been passed on before." (*Nichols* v. *Long Island Lighting Company,* 207 F. 2d 931.)

Petitioners thereupon moved in the District Court for its order directing SEC to proceed with hearings as tendered in its brief before the Court of Appeals, hereinabove set forth. The District Court denied this motion in the following memorandum by Chief Judge Inch:

> "* * * However, in affirming the order of dismissal of this complaint, the Court of Appeals denied appellants' permission to proceed further on these claims in the consolidation proceeding. Accordingly, the motion to amend is denied." (E. D. N. Y., unreported, December 24, 1953.)

Thereupon, petitioners appealed from the order entered thereon, thereby in effect asking the Court of Appeals whether its affirmance was intended to let the petitioners proceed further, before SEC, or otherwise, with their action for fraud and conspiracy.

To this application the Court of Appeals responded in a *per curiam* opinion (211 F. 2d 392), reading as follows:

> "In our prior opinion in this case, 207 F. 2d 931, we affirmed the order of the District Court dismissing the action herein. We did so first on the ground that the action was a collateral attack and as such was prohibited by the injunction accompanying the consolidation decree. Moreover, we found that the claims presented were not new but had been passed on before or were known at the time of previous attacks on the decree. See 197 F. 2d 709. Thus the plaintiffs should have been barred from proceeding further on the basis of the allegations presented in the complaint. However, Judge Inch's order dismissing the action contained the following clause: 'without prejudice to any further proceedings which the plaintiffs herein may desire to undertake, pursuant to this Court's reserved jurisdiction in said Civil Action No. 10,413, to vacate or modify the order in the aforesaid action by reason of the allegations set forth in the *complaint herein.*' In view of our further findings of *res judicata* this clause should have been stricken out. Accordingly, we modify our former decision by striking out the above clause, and as modified we affirm the order dismissing the action below.
>
> Judgment modified and as modified affirmed; mandate recalled and amended accordingly."

Petitioners thereupon moved for reargument, which was denied instanter without opinion (unreported, April 7, 1954, printed at page 42 of the appendix hereto). On this petition for rehearing before the Court of Appeals counsel for the petitioners pointed out the following:

> "The effects of this opinion are as follows:
>
> (1) It denies any trial, by jury or otherwise, of a common law action for fraud and conspiracy, in which the District Court previously denied a motion to dismiss the complaint and for sum-

mary judgment on the ground that it failed to state a cause of action.

(2) It deprives these plaintiffs-appellants of the opportunity suggested and tendered by SEC to have heard and tried before it the plaintiffs-appellants' allegations of fraud and conspiracy *with its findings subject to judicial review.*

(3) It is completely in error factually in its statement that 'the claims presented were not new and had been passed on before at the time of previous attacks on the decree'. Only *two* of the following claims of conspiracy and fraud have the plaintiffs-appellants, even by affidavit, been permitted to present to this Court [of Appeals] or any other court or to the SEC:

(a) That after the New York State Recapitalization of 1944, the common stockholders were not only not permitted but prevented from holding any meeting, although they were vested with the sole voting power.

(b) That the Long Island Lighting Company management concealed until 1948 all actual notice from the stockholders of the proceedings begun in 1944 before the SEC, the PSC, the United States District Court and the United States Court of Appeals.

(c) That the Company's earning power and depreciation reserve were misrepresented to the SEC, and the common stockholders were deprived, through the machinations of Long Island Lighting Company, of any chance to raise the necessary funds for expert services and testimony as to the true state of the depreciation reserve.

(d) That there was deliberate concealment of pending proceedings before the PSC as to the depreciation reserve, at the time this Court affirmed the enforcement order, by which time proceedings instituted by Long Island Lighting Company a year earlier had reached a point where a reduction of $3,000,000 was a practical certainty.

(e) That there was deliberate concealment of the fact that, when this Court affirmed the enforcement order that the company's net earnings had already exceeded by a half a million dollars the estimate of annual earnings on which the reorganization was based and on which this Court affirmed the enforcement order.

(f) That there was deliberate concealment and misrepresentation of the results of the introduction and use of natural gas by the Long Island System.

(g) That there was deliberate effort to prevent a common stockholders' meeting in 1949 in time to have frustrated the conspiracy charged in the complaint, to have removed the management, regained the Company's exemption from the PUHCA and reactivated the completed recapitalization of 1944, under which all accrued dividends on the preferred stock would by now have since been paid out of earnings and these plaintiffs-appellants would have owned in their own right 49% plus of the common stock, of the LILCO with current annual earnings of $10,000,000.

(h) That, projected in 1942, as shown by an exchange of correspondence between Duff & Phelps, recognized public utility engineers of Chicago, George S. Munson, an outstanding lawyer of Philadelphia, based upon an entirely correct and proper opinion of Messrs. Shearman & Sterling of New York, there was devised by one Milton S. Pollock, Esq., a lawyer of this city and a self-constituted committee of preferred stockholders, represented by the firm of Unger & Pollock, a scheme, activated in 1944, to wipe out the common stockholders with 5% of the common stock of a proposed reorganized company, to that extent to confiscate their property rights, to dissolve the company without their knowledge or consent, in the process to 'black out' their voting rights, which controlled the company, by the deliberate and admitted 'invention' of spurious grounds of superseding jurisdiction in the SEC, replacing the PSC of New York, of which the following is indicative, quoted from a printed brief of *David K. Kadane*, submitted on the fee hearings by him as general counsel for the Long Island Lighting Company to which position he was appointed in 1946, having originally appeared in this matter before this Court in 1944 as Special Counsel for the SEC; brief dated June 8, 1951:

'In February, 1944, the Committee (of Preferred Stockholders) wrote a letter to the Commission requesting that the exemption of Long Island be revoked or modified (Pol. Ex. 2). Shortly thereafter the 1944 plan of recapitalization of Long Island was submitted to the New York Commission by the Company (Pol. Pet. 24). The Committee opposed this plan and solicited proxies for the special stockholders meeting, but more than the required two-thirds of the preferred holders voted approval (Pol. Pet. 26). Counsel appeared at subsequent hearings before the New York Commission which FINALLY approved the plan in December, 1944 (Pol. Pet. 26-27, 32). Meanwhile, on November 4, the Committee had filed a petition with this Commission for the revocation or modification of the exemption of Long Island from the Act; the Commission ordered hearings on the issue (Pol. Pet. 29, 30).

'Pollock expressed as the "vital aspect" of their services the organization of the preferred stockholders, the "arousing" of the

New York Commission, the negotiations with the Company, the creation of an atmosphere of pressure which forced the company to make a move towards a plan, and the *"invention" of grounds of interstate commerce* which would support the Commission's jurisdiction (S. M. 79-80). The efforts to organize the preferred stockholders met with the light response of 5% (S. M. 82), compared with the "Langley" Committee's representation of over 50% of the same class of stock (S. M. 375). Pollack's explanation of the benefit conferred by "arousing" the New York Commission is that they generated the interest of the Chairman in the possibility of federal reorganization which generated the search for a basis of federal jurisdiction (S. M. 83). The fact is that the New York Commission approved the 1944 plan which counsel had opposed before them (S. M. 84, 85). An attempt is also made to illustrate benefit flowing from conversations with the Company and such "pressure" as they alleged to have manufactured. The benefit claimed is the filing of the 1944 plan by the Company (S. M. 85-92), the very plan they opposed.

'The last "vital" item enumerated was the "invention" of grounds of interstate commerce, the facts of which were alluded to previously. It has been admitted that Granger, who practised law for two years, thirty years ago (S. M. 153), suggested the legal solution which put their research on the proper path.'

(i) That the surreptitious and ultra vires, as far as the officers and Board of Directors was concerned, surrender of Long Island's 8-year-old and invaluable exemption from the Public Utility Holding Companies Act was a premeditated and advised design to prevent an affirmance by the United States

Supreme Court of the decision of this Court, barring SEC from interfering with the completed recapitalization of Long Island Lighting under the laws of New York and obliterating the statutory powers and duties of its Public Service Commission.

(j) That the employment of David K. Kadane, as general counsel for Long Island, after his designed resignation as special counsel for SEC, was by pre-arrangement and in direct violation of Paragraph (a) of Rule 6 of the SEC (SEC Release No. 3465), which reads 'Paragraph (a) Rule 6 prohibits *without limit of time* former members and employees from appearing before the Commission in a particular matter with respect to which they had prior official responsibility or specific knowledge.'

(k) That the secret, overnight and ultra vires action of the Long Island Board of Directors and management, to sell the Long Island lock, stock and barrel at half its known and provable value was designed as a part of the conspiracy unjustly to enrich the salaried management of Long Island Lighting Company at a prodigious loss to the common stockholders, in flagrant violation of the statutory and common law fiduciary duties as the directors and officers.

(l) That the grounds upon which SEC was induced to oust the PSC and the State of New York of all jurisdiction over a domestic corporation engaged solely in intrastate business were on their face sheer fiction and pretense to the point of absurdity, namely and we quote *'i.e. that the activities of the system directly affected interstate commerce and that the accumulated arrears on the system companies preferred stock constituted a burden on interstate commerce.'* The more shocking does this become in the face of the notorious fact that Consolidated

Edison, a vastly larger and more widespread corporation is, and always has been, exempt from the PUHCA and so treasures that exemption that it suddenly terminated its agreement to buy the Long Island Lighting Company at half its value when the issue of the exemption was brought into the open by counsel for the common stockholders, when the purchase was before the SEC for approval.

(4) It completely errs as a matter of law in holding that the beginning of this action was a 'collateral attack and as such was prohibited by the injunction accompanying the consolidation proceeding'. This action in no way attacks the validity, force and finality of any decree in the consolidation proceeding. If it did, then the instant action would not lie. It is because the fraud and conspiracy were successful in procuring a decree of such unassailable finality (once this Court had disagreed with these plaintiffs-appellants that it had itself been misled and defrauded) that the plaintiffs' cause of action became consummate, as we have pointed out in previous briefs. The plaintiff and his counsel should be adjudicated in contempt if the conclusion of the opinion on the decision here sought to be reheard is correct.

(5) Its conclusion that the doctrine of *res judicata* is here applicable not only is in complete conflict with its own prior decisions (147 Fed. 2d at page 903), and countless others but violently disregards the facts. *There was no evidence of conspiracy and fraud, on which any reputable counsel would rely, until after this Court had affirmed the enforcement order;* this statement is made unequivocally and no such charge had been made until the instant complaint was filed. The first charge was made before this Court after it had affirmed the enforcement order and dealt only with misrepresentations as to earnings and depreciation reserve. The first intima-

tion of a conspiracy came to these plaintiffs-appellants between April 18 and 27, 1951, in the following and related testimony before SEC Hearing Examiner Townsend in Washington on the examination of Milton Pollack as to his claimed fee of $350,000, Mr. Kadane appearing as general counsel for Long Island Lighting Company:

> 'The Witness: I offer in evidence the letter of the preferred stockholders committee of LILCo dated July 7th, 1943, which letter is not otherwise in these proceedings, as incorporated up to this point.
>
> 'Examiner: Is there any objection?
>
> 'Mr. Kadane: I have the same objection to all of this.
>
> 'Examiner: The exception is granted and it will come in as Mr. Pollack's 3. (P's exhibit 3 in evidence.)
>
> 'The Witness: I would like to draw the trial examiner's attention to the second page which reads in part as follows, dated July 7, 1943:
>
>> "We propose and will contend for the following plan: One class of stock, to wit, common stock, 95% to go to the present preferred stockholders and 5% to the present common stockholders. As there would be no preferred stock ahead of the common stock this would be equivalent to getting 95% of the earnings for the present preferred stockholders.
>>
>> "As the present common stockholders have no equity in the property, in the opinion of the PSC, the 5% would give them compensation for the possibility that at sometime in the future something might be earned on the common stock. This possibility, although very remote, has been recognized by the SEC in similar recapitalizations as having a small value."

'I now offer in evidence two re-prints which the committee circulated to the preferred stockholders, one from the Journal of Commerce, dated Feb. 9, 1944, and the second from the NY Sun dated Feb. 17, 1944, neither reprint being, at the present time, in the record as incorporated in these proceedings.

'Mr. Kadane: I object on the further ground that it may be bad to clutter up this record with letters not written by the committee, it is a great deal worse to clutter up the record with newspaper clippings. I don't see how that could possibly have any bearing on the compensation this committee or its counsel seeks unless counsel is taking credit for the writing of those stories, which I don't understand.

'The Witness: I would like once and for all to set Mr. Kadane straight on the basis of which fees in any normal proceedings, in my opinion, in any normal office are charged and paid. One of the bases, and an essential basis, is the difficulty of the task assumed, and when the Company has created the difficulty to the inordinate degree that this company created it up until 1945, *that was a measure of the extent and ingenuity* of the services required in these proceedings.

'One of the things that made the services ultimately possible was the continuing pressure against the company war-chest, and company activities; proceedings which, at the time, I think you were familiar *with as a member of the staff of the SEC.'*

It necessarily follows that it is a physical impossibility that as stated in the opinion here sought to have reconsidered, 'the claims presented (by the complaint) were not new but had been passed on before or were known at the time of previous attacks on the decree.'

(6) It is completely in conflict with the unanimous decision of this Court as to the law of collateral attack on judgments and decrees, even if this action were a collateral attack. (See opinion of this Court [Swan, Clarke and Frank in the Griffith case, 147 Fed. 2d at page 901].)

We quote the following from the opinion of this Court (Judges Swan, Clarke and Frank) in the *Griffith* case, *supra,* at page 901:

> 'We agree with the District Court's view that this action was a collateral attack on the New York Supreme Court judgment. * * * But we cannot agreed with the District Court's further conclusion that a judgment cannot be attacked collaterally, and that parties seeking relief from it must do so in the original action. * * *'

And, at page 903:

> 'The Crouse case (relied on by the District Court below) therefore, actually reiterates and reenforces the general rule, well settled in New York, that judgments obtained by extrinsic fraud can be attacked collaterally (cases cited). * * * It seems fairly clear, therefore, that New York does allow collateral attack on a judgment for extrinsic fraud or duress, as we concluded after an extensive analysis of the cases dealing with foreign divorce decrees. *Cohen* v. *Randall,* 2 Cir., 137 F. 2d 441, 443, 445, certiorari denied 320 U. S. 796, 64 S. Ct. 263.'

The opinion and decision on which rehearing is here sought assumes an erroneous rationale as to the proceedings of the plaintiffs-appellants herein. The plaintiffs-appellants seek an opportunity to offer their evidence on the simple question:

> Was there a conspiracy to defraud the common stockholders, was fraud practiced upon them, and what, if any, damage did they suffer?

In an earlier brief, we pointed out that as far back as 1942 the Preferred Stockholders, or one group of

> them, presented to SEC a proposed plan of reorganization under which the old common stockholders were to receive 5% of the common stock of the new company, as shown by the Pollack testimony earlier quoted. So well schemed was the conspiracy that after 8 years of proceedings and litigation, they came out with 5.7% and the inventor of the scheme claimed $350,000 for his invention of the scheme and was paid $75,000 by the LILCO. This is hardly coincidental."

It is from the last decision of the Court of Appeals, dated April 7, 1954, that petitioners seek relief by being allowed to appeal to this Court and now file their petition for a writ of certiorari.

When the appeal from the decision of which a writ is now asked was pending, the same Court of Appeals had before it, waiting decision, in the same matter, an appeal involving the allowance of counsel fees in the Long Island Lighting Company reorganization. We quote in part from its decision on that appeal:

> "In the case at bar all the claims are limited to services rendered after June, 1948, when the 'Committee' was allowed to intervene; and by that time we had decided that the SEC was paramount, and the Supreme Court had refused to intervene. We may of course have been mistaken; but it should have appeared to Mr. Aron to the last degree unlikely that our ruling would not remain authoritative. We cannot, therefore, accept as compensible any efforts directed toward the possibility that the case would not have to be worked out in the pending proceeding. * * *" (*Nichols, et al.* v. *S. E. C. and Long Island Lighting Company,* 211 F. 2d 412.)

Argument Amplifying the Reasons Relied on for the Allowance of the Writ (Rule 23(h))

There is here presented the extraordinary situation of a statute, designed to protect the public, being used to consummate a colossal fraud on the public, by the use of intrigue, misleading testimony, concealment, misrepresentation, legal legerdemain and the hiring of opposing counsel to consummate the conspiracy, by which the original Long Island Lighting Company in which these petitioners owned all the voting and common stock is dissolved without their consent and its assets transferred to a new corporation in which they are accorded a minimal fractional participation, slightly more than was projected by the conspirators in 1942, when the conspiracy charged in the complaint was instigated.

There is presented here a case unique in the annals of American jurisprudence, where, in a common law tort action, the defendant has not been required to answer, demur or plead or be examined and the plaintiffs have been denied any right of trial or even a pretext of a day in court.

There is presented here probably the only recorded case wherein a statute of the United States has been perverted by intrigue, fraud and conspiracy to oust a state of jurisdiction of one of its own intrastate corporations, to dissolve such corporation without notice to and consent of its stockholders or approval of the state of incorporation, where property rights of said stockholders worth in excess of thirty million ($30,000,000) have been confiscated down to a value of three million ($3,000,000) dollars—in short, where a federal statute and a former federal employee, delegated by SEC to carry out the provisions of the so-called "death act" and possessed of special knowledge of the Long Island Lighting Company situation and of the statute, and the regulations and procedure thereunder, have been used as an engine of conspiracy, fraud and the destruction of property rights of American citizens.

It is for this reason that the following questions, while not presented by this petition, may be found worthy of consideration by this Court, particularly under the closing provision of Rule 19(b)—after all, this is a petition to *review* what has happened below, including necessarily the conduct of the proceedings before the SEC, sanctioned in decisions of a District Court and two Courts of Appeals.

At the outset, if this matter is carried back to its origin, there is involved the same question presented to this Court in 1944 (*S. E. C.* v. *Long Island Lighting Co.*, 324 U. S. 837) but dismissed as moot by the voluntary submission by the directors and management of Long Island Lighting Company to the non-existent jurisdiction of the SEC under the PUHCA (325 U. S. 833), as the first step in the conspiracy and fraud which is set forth in the complaint now here. *This question of jurisdiction of SEC under the PUHCA over Long Island Lighting Company has never been decided by this or any other Court:* to wit, whether the nonpayment of dividends by a strictly intrastate corporation, *per se et eo instanti* creates federal jurisdiction over such corporation under the PUHCA, solely because the shares of the corporation are owned in part by residents of other states, on the ground that nonpayment of dividends creates a burden on interstate commerce. The question has not been before this Court, other than having been raised in prior petitions for certiorari in the reorganization proceeding, denied by this Court, or rendered moot by the actions of the corporation which as the Court has repeatedly held carries no implication of the correctness of the decision in the lower courts. The dicta of Judge Learned Hand in the Kings County case (*Public Service Commission* v. *S. E. C.*, 166 F. 2d 784), on which counsel for the defendant had wrung all the changes in the past ten years of this litigation, is not a decision of the point and involved a controversy between the Public Service Commission of New York and the SEC to which neither this defendant nor these petitioners were parties.

A second question involved is whether an action in tort for damages, arising from undenied fraud and conspiracy in procuring a judgment and enforcement order under the PUHCA, but which judgment and order is recognized as final and unassailable, and completely submitted to by these petitioners, the plaintiffs in such action, is a collateral attack on such judgment and order and as such cannot be maintained or heard in any court.

A third question involved is that stated by the Court of Appeals below in this matter:

> "Whether petitioners have a right to proceed by motion or independent action in the District Court without obtaining leave of this Court is a matter on which we express no opinion." (*In re Long Island Lighting Company,* 197 F. 2d 709, 710).

In theory, to sustain the constitutionality of the PUHCA the device is adopted of seeking a final decree in the form of an enforcement order in the District Courts. As was pointed out before the District Court in this proceeding in a brief submitted to it, decisions of the District Courts in such proceedings in a vast majority of cases reduces to the District Court, "rubber stamping" the findings and conclusions of the omnipotent and omniscient so-called "Staff" of the SEC. That this is fact is manifest from the phenomena that in only a minute number of instances have the findings and conclusions of the SEC been disturbed by the courts, since this so-called "death act" took effect in 1936, a ratio of infallibility rarely encountered in judicial and quasi-judicial proceedings.

While it may be that such defects are intrinsic in the nature of administrative law in the vastly complicated proceedings which administrative agencies are compelled to decide in the modern intricacies of commerce, again, it must be said, that the greater is the importance of leaving the doors of common law justice open to those who have illegally suffered thereby.

This petition may raise, and we think it does, a great question of modern jurisprudence: Whether, making a virtue of the necessity for administrative law and agencies in the conduct of government, the courts may not safeguard the constitutional rights of injured parties in common law actions when fraud, conspiracy, perjury, error, etc., are in perspective revealed in such proceedings, as is here the case.

While in view of the prior history of the Long Island Lighting Company reorganization, of necessity and in law and logic, the complaint dismissed below gives full faith and credit to the enforcement order and recognizes the finality of the reorganization proceeding under PUHCA, this petition nonetheless calls in question the constitutionality of the PUHCA in the light of the regulations and practice adopted by the SEC in its enforcement.

The complaint, the dismissal of which is the basis of this petition, alleges that the defendant, Long Island Lighting Company and its management, owning less than 1% of its stock, conspired with its preferred stockholders to defraud the petitioners of their common stock and voting power by using the PUHCA, as administered by SEC, as one of the means, coupled with false testimony and duress, of accomplishing the confiscation of the common stock by a dissolution of the corporation without their consent. Whether administrative regulations and practices can render unconstitutional an otherwise constitutional act of the Congress is a question not necessarily involved on this petition, but it is, we believe, properly presented by way of argument for this Court's consideration, for had the PUHCA not been in effect amended by the regulations and practices of the SEC in barring these petitioners from anything like a fair hearing, as eminent judges of this Court have defined a fair hearing (Chief Justice Hughes and Justices Brandeis and Cardozo; *Morgan* v. *United States,* 298 U. S. 468, 304 U. S. 1; *Railroad Commission of California* v. *Pacific Gas & Electric Co.,* 302 U. S. 388; *St. Joseph Stockyards Co.* v. *United States,* 298 U. S. 38, 73, and *Ohio Tel. Co.* v. *Public Utilities Commission of Ohio,* 301 U. S. 292), the PUHCA would not have proved the catalyctic element that made the fraud and conspiracy succeed in this case.

That these petitioners, representing nearly a third of twelve thousand common stockholders, under written authorization from them, had no right to appear in these proceedings, except by grace of the SEC, to defend their rights and property, is manifest in the fact that they were granted, as a matter of grace, on petition to the SEC a *limited participation* in the reorganization proceedings.

That these petitioners were denied the right of assembly is manifest in the denial of their petition to be allowed to collect funds from among themselves for their common defense. (*Halsted* v. *S. E. C.,* 182 F. 2d 660.)

The mere statement of what is here an actuality carries its own proof: There can be no semblance of a fair trial before a tribunal which excludes or dictates the terms of admission to those it will hear, however vitally their rights and property may be affected, by a proceeding to determine the final evaluation of their rights and property; which controls by indirection the employment and compensation of counsel in defense of those rights and the procurement of necessary expert testimony as to their value; where the proceeding is conducted by a "staff" of employees which simultaneously acts as a prosecutor and judge and rules on the admission and exclusion of evidence and as a practical matter fixes the fees of counsel who support or oppose it on a reward or punishment basis.

As a result, Justice is utterly uncertain under the SEC procedures governing the PUHCA; hence, it seems irrefutable that where justice has not prevailed in such a proceeding, through fraud, conspiracy, false testimony or other cause, including fraud on the courts, and judicial error resulting from the sheer weight of the proceeding beyond the physical carrying power of any court, the victims of such injustice shall be allowed free access to the courts in common law proceedings, with the protection of a jury trial, for the injury suffered by them as the result of fraud and conspiracy. In this connection we refer to the study on administrative agencies prepared for the Commonwealth Fund in 1942 by Professor Joseph D. Chamberlain and others, *The Judicial Function in Administrative Agencies,* at pages 193-207 (see also Evatt, *Rum Rebellion,* page 169, alluded to by Professor Chamberlain).

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

ENNIS M. NICHOLS,
Petitioner.

HAROLD G. ARON,
Attorney for Petitioners.

APPENDIX

Opinion of United States Court of Appeals, Dated November 12, 1953

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 56—October Term, 1953.

(Argued October 15, 1953 Decided November 12, 1953.)

Docket No. 22723

Ennis M. Nichols, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and Common Stockholders Committee of Long Island Lighting Company,
Plaintiffs-Appellants,

against

Long Island Lighting Company,
Defendant-Appellee.

Securities & Exchange Commission,
Intervenor-Appellee.

Before:

L. Hand, Swan and Augustus N. Hand,
Circuit Judges.

Appeal from the United States District Court for the Eastern District of New York, Robert A. Inch, *Judge.*

Opinion of United States Court of Appeals, Dated November 12, 1953

From an order dismissing the complaint as a prohibited collateral attack upon an outstanding decree enforcing a consolidation plan under Sec. 11 (e) of the Public Utility Holding Company Act, 15 U. S. C. A., §79, the plaintiffs appeal. Affirmed.

HAROLD G. ARON and ARMSTRONG & KEITH, *Attorneys for Appellants.*

DAVID K. KADANE, *Attorney for Defendant-Appellee*; Charles E. Elbert and Bertram D. Moll, of counsel.

ROGER S. FOSTER, General Counsel; Myron S. Isaacs, Associate General Counsel, *for Securities and Exchange Commission, Intervenor-Appellee*; Aaron Levy, of counsel.

AUGUSTUS N. HAND, *Circuit Judge*:

This is an action sounding in tort brought by the plaintiff Nichols as representative of a group of the old common stockholders of the defendant Long Island Lighting Company (hereinafter referred to as Long Island). The charge is one of conspiracy and fraud against the defendant which is said to have resulted in damage to the stockholders in the amount of $27,500,000.

The parties here involved have been engaged in controversy over a number of years. A brief history of Long Island and recent litigation will be helpful in understanding the case. On March 27, 1936, the Securities & Exchange Commission entered an order under Section 3 (b) of the Public Utility Holding Company Act of 1935, 15 U. S. C. A. Sec. 79k(b), granting an exemption to Long Island from the registration provisions of that Act. In

1936 the company suspended payment of dividends on its preferred stock and in 1944 it submitted a reorganization plan to its stockholders whereby the par value and current dividend rights of its preferred stock were to have been reduced by 40%; the accrued dividend arrears of the preferred were not to be affected; and a new issue of common stock was to have been distributed approximately one-half to the holders of preferred and the balance to the common. Although the plan was approved by the stockholders and, with some modifications, by the Public Service Commission of New York, it was never put into effect. The S. E. C.'s attempt to enjoin the consummation of the plan, pending redetermination of the exemption, failed in the first instance, 59 F. Supp. 610, affirmed 148 F. 2d 252 (2d Cir.), and certiorari granted by the Supreme Court, 324 U. S. 837, became moot, 325 U. S. 833, when the S. E. C. completed its proceedings and revoked the company's exemption from the P. U. H. C. A., in which order the company acquiesced.

In 1945 Long Island filed an application with the S. E. C. under Section 11(e) of the P. U. H. C. A., 15 U. S. C. A. §79k(e) for approval of a plan of consolidation of the company with the Queens Borough Gas & Electric Company, Nassau & Suffolk Lighting Company and Long Beach Gas Company. For four years the plan was under consideration by the S. E. C. The Public Service Commission was also involved in consideration of these plans until 1948 when it was held that it had no jurisdiction with respect to the allocation of securities of public utilities companies in the State of New York which were being reorganized under Section 11 (e) of the P. U. H. C. A.—the S. E. C. having exclusive jurisdiction. *In re Kings County Lighting Co.*, 72 F. Supp. 767, affirmed sub nom. *Public Service Commission* v. *Securities and Exchange Commission*, 166 F.

2d 784, cert. denied, 334 U. S. 838. The present plaintiffs' committee was formed in 1948 and took part in these proceedings. On November 16, 1949, the S. E. C. entered an order of consolidation and reorganization which, although giving the old common stockholders of Long Island much less than the 1944 plan, gave them five per cent of the new common stock to be issued. It is to be noted that the P. S. C. in 1947 had refused to give the old common any share in the new company to be formed. For a more detailed discussion of these administrative proceedings and the proposed plans see the opinion of Judge Kennedy in *In re Long Island Lighting Company*, 89 F. Supp. 513.

A petition for enforcement of the consolidated plan was granted in this district court after a finding that the plan was fair and equitable. *In re Long Island Lighting Company*, 89 F. Supp. 513. This order was affirmed by us, 183 F. 2d 45, and certiorari was denied by the Supreme Court, 340 U. S. 834. Subsequently, the present stockholders' committee sought to set aside the order, reopen the proceeding, or grant leave to file a bill of review in the district court on the ground that the order was entered "under circumstances tantamount to fraud effected and committed by said Long Island Lighting Company upon the Securities and Exchange Commission, the Court below and this Court." We denied this motion finding that "the facts alleged in the petition do not show that fraud was practiced upon the Commission, the District Court or this court." 197 F. 2d 709, 710 (2d Cir.).

The same plaintiffs now attempt to escape the conclusive effect of these prior proceedings by bringing a tort action against the new company. In substance it is alleged that the defendant's predecessor conspired with certain of its preferred stockholders to defeat the rights of the plaintiffs as established under the 1944 recapitalization plan. It is said to have been accomplished (1) through requesting the S. E. C. to institute proceedings in the federal court to enjoin the enforcement of the 1944 plan; (2) by waiving its exemption under the P. U. H. C. A. when the injunction failed; (3) by presenting a plan to the S. E. C. which ignored the vested rights of the plaintiffs under the 1944 plan and that "* * * said actions * * * were taken in bad faith to continue the old management, and said order was obtained by deception, intrigue, misrepresentation and concealment before the Securities Exchange Commission and this Court." In the court below the S. E. C. moved to intervene and dismiss the action as a collateral attack on the 1950 decree enforcing the consolidation. That decree contained an injunction, pursuant to 15 U. S. C. A. §79k(e) and §79r(f), to the effect: "(10) Long Island Lighting Company, Queens Borough Gas & Electric Company and Nassau & Suffolk Lighting Company, and all their creditors and security holders, and all persons be, and they are hereby enjoined and restrained from doing any act or taking any action interfering with, or tending to interfere with, these proceedings * * * including the commencement or prosecution of any action, suit or proceeding, at law or in equity, or under any statute, in any court or before any executive or administrative officer, commission or tribunal, other than such proceedings before the Commission or this Court as may be authorized by the Act or the Rules and Regulations promulgated thereunder, and such review, if any, in an appropriate Court of Appeals as may be provided by law."

The District Court granted the motion of the S. E. C. to intervene and dismiss the action on the ground that the plaintiffs' action violated the injunction order, but made the order without prejudice to the plaintiffs to undertake any further proceedings pursuant to the jurisdiction reserved by the court under the injunction order to vacate or modify said order by reason of the allegations set forth in the complaint. The defendant's motion for summary judgment on the ground of *res judicata* or for dismissal of the complaint for failure to state a claim was denied, not on the merits, but because of dismissal of the complaint on the above grounds on the motion of the S. E. C.

All the acts of fraud and conspiracy complained of by the plaintiffs took place before the plan of consolidation and reorganization was approved by the S. E. C. and the courts. If they were unlawful, that fact should have been established in that proceeding as there the rights of the stockholders in the new corporation were fixed. As the matter stands, the order of the S. E. C. is final and is not open to collateral attack. The plaintiffs should not be allowed to hold the new corporation liable for acts which, if true, affected only the rights of the old stockholders as determined in the reorganization proceeding. Judge Inch, in the court below, dismissed the action solely on the ground that it was a collateral attack prohibited by the injunction which was part of the equity decree enforcing the 1949 plan of consolidation. Since the relief sought by the plaintiffs here will upset the allocations made under that decree, the injunction would seem to apply. This is another ground for upholding the decision to dismiss the complaint as prohibited collateral attack. It is argued by the plaintiffs that the opinion of the First Circuit in *Petition of Blatchley,* 157 F. 2d 894, indicates that such an attack as they seek here would be allowed. But in that case the attack was by a stockholder who was not a party to the reorganization proceedings and the remarks they rely on are at most mere dicta.

In addition to the foregoing, the defendant argues that the proceedings in this court in review of the consolidation plan act as a complete bar to the plaintiffs' claim here. We agree with this argument. The plaintiffs strenuously opposed the approval of the plan in those proceedings and at that time presented most of the claims made here. They have not presented us with any new claims of fraud that were not known at the time of our decision on the motion to reopen the order in 1952. 197 F. 2d 709. While the claims made here may sound in tort they are really the same claims heretofore litigated and determined by us against the plaintiffs.

For the foregoing reasons we affirm the order of dismissal both because our prior decisions are *res judicata* and as such a bar to the present action, and also because a collateral attack upon a judgment already rendered is not in our opinion permissible. Furthermore we see no reason under the circumstances why the plaintiffs should be allowed to proceed further on a direct attack against the consolidation decree on the basis of the claims before us because they have been passed on before.

AFFIRMED.

Judgment of United States Court of Appeals, Dated November 12, 1953

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of November, one thousand nine hundred and fifty-three.

Present:

Hon. LEARNED HAND,
Hon. THOMAS W. SWAN,
Hon. AUGUSTUS N. HAND,
Circuit Judges.

ENNIS M. NICHOLS, *et al.*,
Plaintiffs-Appellants,
v.
LONG ISLAND LIGHTING CO.,
Defendant-Appellee,
SECURITIES AND EXCHANGE COMMISSION,
Intervenor-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

Judgment of United States Court of Appeals, Dated November 12, 1953

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the Orders of said District Court be and they hereby are affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell,
Clerk.

(Vacated—3/22/54)

Opinion of United States Court of Appeals, Dated March 22, 1954

UNITED STATES COURT OF APPEALS

For the Second Circuit

October Term, 1953.

(Motion submitted February 1, 1954
Decided March 22, 1954.)

Docket No. 22723

Ennis M. Nichols, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and **Common Stockholders Committee** of Long Island Lighting Company,
Plaintiffs-Appellants,

against

Long Island Lighting Company,
Defendant-Appellee.

Securities & Exchange Commission,
Intervenor-Appellee.

Before:

L. Hand, Swan and **Augustus N. Hand,**
Circuit Judges.

Opinion of United States Court of Appeals, Dated March 22, 1954

Harold G. Aron, *Attorney for Plaintiffs.*

David K. Kadane, *Attorney for Defendant.*

Myron S. Isaacs, *Associate General Counsel Securities and Exchange Commission.*

On petition to amend order and/or opinion.

Per Curiam:

In our prior opinion in this case, 207 F. 2d 931, we affirmed the order of the district court dismissing the action herein. We did so first on the ground that the action was a collateral attack and as such was prohibited by the injunction accompanying the consolidation decree. Moreover, we found that the claims presented were not new but had been passed on before or were known at the time of previous attacks on the decree. See 197 F. 2d 709. Thus the plaintiffs should have been barred from proceeding further on the basis of the allegations presented in the complaint. However, Judge Inch's order dismissing the action contained the following clause: "without prejudice to any further proceedings which the plaintiffs herein may desire to undertake, pursuant to this Court's reserved jurisdiction in said Civil Action No. 10,413, to vacate or modify the order in the aforesaid action by reason of the allegations set forth in the *complaint herein.*" In view of our further finding of *res judicata* this clause should have been stricken out. Accordingly, we modify our former decision by striking out the above clause, and as modified we affirm the order dismissing the action below.

Judgment modified and as modified affirmed; mandate recalled and amended accordingly.

Order of United States Court of Appeals, Dated March 22, 1954

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of March, one thousand nine hundred and fifty-four.

Present:

Hon. LEARNED HAND,
Hon. THOMAS W. SWAN,
Hon. AUGUSTUS N. HAND,
Circuit Judges.

ENNIS M. NICHOLS, *et al.*,
Plaintiffs-Appellants,

v.

LONG ISLAND LIGHTING CO.,
Defendant-Appellee,

SECURITIES AND EXCHANGE COMMISSION,
Intervenor-Appellee.

The opinion of this Court herein dated November 12, 1953 having been modified on March 22, 1954, after motion by counsel for appellants to amend the judgment and/or the opinion of this Court

Order of United States Court of Appeals, Dated March 22, 1954

It is hereby ordered that the judgment of this Court dated November 12, 1953 be and it hereby is vacated.

It is further ordered that a judgment be entered on the opinion of this Court as modified.

It is further ordered that the mandate of this Court be recalled and amended in accordance with the modification of the opinion of this Court.

A. Daniel Fusaro,
Clerk.

Judgment of United States Court of Appeals, Dated March 22, 1954

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of March, one thousand nine hundred and fifty-four.

Present:

Hon. Learned Hand,
Hon. Thomas W. Swan,
Hon. Augustus N. Hand,
Circuit Judges.

Ennis M. Nichols, *et al.*,
Plaintiffs-Appellants,

v.

Long Island Lighting Co.,
Defendant-Appellee,

Securities and Exchange Commission,
Intervenor-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

Judgment of United States Court of Appeals, Dated March 22, 1954

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of January 22, 1953 of said District Court be and it hereby is modified by striking from said order dismissing the action the following clause: "without prejudice to any further proceedings which the plaintiffs herein may desire to undertake, pursuant to this court's reserved jurisdiction in said Civil Action No. 10,413, to vacate or modify the order in aforesaid action by reason of the allegations set forth in the complaint herein;" and as so modified said order dismissing the action below be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

A. Daniel Fusaro,
Clerk.

Order of United States Court of Appeals, Dated April 7, 1954

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of April, one thousand nine hundred and fifty-four.

Present:

Hon. LEARNED HAND,
Hon. THOMAS W. SWAN,
Hon. AUGUSTUS N. HAND,
Circuit Judges.

ENNIS M. NICHOLS, and the COMMON STOCKHOLDERS COMMITTEE OF THE LONG ISLAND LIGHTING COMPANY,
Appellants,

v.

LONG ISLAND LIGHTING COMPANY,
Appellee.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

Office - Supreme Court, U.
FILED
JUN 3 1954
HAROLD B. WILLEY, Cle

No. 188

United States Court of Appeals
FOR THE SECOND CIRCUIT

ENNIS M. NICHOLS, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and COMMON STOCKHOLDERS COMMITTEE of Long Island Lighting Company,

Plaintiffs-Appellants,

against

LONG ISLAND LIGHTING COMPANY,

Defendant-Appellee.

SECURITIES & EXCHANGE COMMISSION,

Intervenor-Appellee.

APPELLANTS' [redacted] APPENDIX

On Appeal From the District Court of the United States for the Eastern District of New York

FILED
JUL 30 1953
SECOND CIRCUIT

Harold G. Aron and
Armstrong & Keith,
Attorneys for Appellants.

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APPENDIX

Docket Entries Applicable to the Matters Under Appeal

[1] *

Nov. 18, 1952—Complaint filed. Summons issued.

* * *

Dec. 11, 1952—Notice of motion filed for summary judgment, etc. (12/17/52).

Dec. 15, 1952—Notice of motion filed for leave to intervene by S. E. C. (12/17/52).

Dec. 17, 1952—Inch, *J.* Motion for summary judgment argued. Decision reserved. Affidavit of Harold G. Aron filed.

Dec. 17, 1952—Inch, *J.* Motion to dismiss, etc. argued. Decision reserved. Affidavit of Harold G. Aron filed.

Dec. 30, 1952—By Inch, *J.* Decision rendered on motion for summary judgment, etc. Motion denied. See memo on companion motion. Submit order.

Dec. 30, 1952—By Inch, *J.* Decision rendered on motion for leave of S. E. C. to intervene, etc. and to dismiss, etc. Motion granted. See memo on papers. Settle order.

Jan. 12, 1953—By Inch, *J.* Order filed denying motion for summary judgment.

Jan. 22, 1953—Affidavit of John S. Keith filed.

Jan. 22, 1953—By Inch, *J.* Order filed granting motion for leave of S. E. C. to intervene and to dismiss action.

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* Figures in brackets refer to pages of original record on file.

Feb. 10, 1953—Notices (2) of appeal filed with bond #1920.

* * *

Mar. 18, 1953—By Inch, *J.* Order dated Mar. 17, 1953 filed, extending time to file record on appeal to May 11, 1953.

* * *

Complaint

[2-6]

UNITED STATES DISTRICT COURT

Eastern District of New York

[Same Title]

Plaintiffs, by Harold G. Aron and Armstrong & Keith, their attorneys, complaining of the defendant, respectfully allege:

First: Plaintiff, Edward M. Nichols, is a citizen of the District of Columbia and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

Second: Plaintiff Common Stockholders Committee of Long Island Lighting Company at all times hereinafter mentioned was duly authorized by upwards of 2,500 of the common stockholders of the defendant's predecessor corporation, owning and holding upwards of 750,000 of its shares, to act for and represent them and act as agent, attorney and proxy for and in the name and stead of said stockholders in all actions, proceedings, reorganizations, recapitalizations, readjustments, mergers and unifications and all other proposals and matters relating to such stock before the Securities and Exchange Commission, and in any court or before any agency or body, none of which authorizations have to the best of plaintiff's knowledge and belief been revoked or withdrawn.

Third: Plaintiff Edward M. Nichols is and at all times hereinafter mentioned has been the owner and registered holder of 775 shares of said common stock and is a member and acting chairman of said Common Stockholders Committee, and resides in Washington, D. C.

Fourth: Defendant is a New York corporation, having its principal place of business at Mineola, Nassau County, Long Island, New York, having been organized pursuant to an enforcement order of this Court, entered on the 17th day of September, 1950, and has assumed all liabilities of its predecessor corporations including Long Island Lighting Company as it was then organized in the year 1944.

Fifth: Pursuant to the laws and statutes of New York, the Long Island Lighting Company was duly recapitalized on December 6, 1944, pursuant to which recapitalization these plaintiffs and other common stockholders similarly situated became entitled collectively to 49.62% of the common stock of the recapitalized company.

Sixth: The defendant's predecessor was obligated and under a duty to respect the rights created by said recapitalization, but in lieu thereof, acting through its officers, directors, attorneys and agents, it conspired with certain preferred stockholders of the predecessor of the defendant to defeat the rights which were vested under the said 1944 recapitalization and to destroy the rights of the plaintiffs and other stockholders similarly situated to the 49.62% of the common stock and the voting rights appurtenant thereto. The said conspiracy was carried out and accomplished by (1) inducing certain preferred stockholders to request proceedings to be instituted in the Federal Court by the Securities Exchange Commission to enjoin any further enforcement of the said 1944 plan; (2) when these proceedings were begun but were unsuccessful by waiving its exemption under the Public Utility Holding Act in order to defeat the State jurisdiction; and (3) by presenting a plan to the Securities Exchange Commission which ignored the vested rights under the 1944 plan resulting in an enforcement order of this Court destroying all but a nominal part of the interest of the plaintiffs and stockholders similarly situated; that said actions by the defendant's predecessor were taken in bad faith to continue the old management and said order was obtained by deception, intrigue, misrepresentation and concealment before the Securities Exchange Commission and this Court.

Seventh: That as a result of the defendant's acts and conduct as aforesaid plaintiffs have suffered and sustained damages amounting to $27,500,000.00.

WHEREFORE, plaintiffs pray that the defendant be ordered, adjudged and decreed to pay to the owners of the common stock of the 1944 recapitalized Long Island Lighting Company, as they existed on the 17th day of June, 1950, damages in the sum of $27,500,000.00, and such other damages and relief as shall justly compensate them for the injuries and losses suffered by them.

HAROLD G. ARON and ARMSTRONG & KEITH,
Attorneys for Plaintiffs,
Office & P. O. Address,
76 Beaver Street,
Borough of Manhattan,
City of New York.

(Verified on November 14, 1952, by Ennis M. Nichols, as one of the plaintiffs.)

Defendant's Notice of Motion for Summary Judgment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

PLEASE TAKE NOTICE that on the complaint herein and the affidavit of Charles E. Elbert, sworn to the 5th day of December, 1952, the undersigned will move this Court, at a motion part thereof, on the 17th day of December, 1952 at 10:00 A. M., or as soon thereafter as counsel can be heard, in the United States Court House for the Eastern District of New York, 271 Washington Street, Borough of Brooklyn, City and State of New York, that it (1) enter summary judgment in defendant's favor dismissing the action, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact and that defendant is entitled to a judgment as a matter of law; (2) dismiss the action for failure to state a claim upon which relief may be granted; (3) that defendant's time to answer or otherwise move with respect to the complaint under Rule 12 of the Federal Rules of Civil Procedure be extended until disposition of this motion; and for such other and further relief as may be necessary in the premises.

Dated: New York, N. Y., December 5, 1952.

David K. Kadane,
Attorney for Defendant,
Office and P. O. Address,
250 Old Country Road,
Mineola, N. Y.

To:

Harold G. Aron and Armstrong & Keith,
Attorneys for Plaintiffs,
Office and P. O. Address,
76 Beaver Street,
New York, New York.

Roger S. Foster,
General Counsel,
Securities and Exchange Commission,
425 2d Street, N. W.,
Washington, D. C.

Affidavit of Charles E. Elbert, Read in Support of Defendant's Motion for Summary Judgment

UNITED STATES DISTRICT COURT

Eastern District of New York

[Same Title]

State of New York }
County of Nassau } ss.:

Charles E. Elbert, being duly sworn, says:

1. I am an officer, Secretary, of the defendant Long Island Lighting Company.

2. I am, by profession, an attorney duly admitted to practice as such in the State of New York and before this Court.

3. I participated fully and actively in the representation of the defendant Long Island Lighting Company ("the Company") before the Securities and Exchange Commission ("the S.E.C."), the District Court for the Eastern District of New York, United States Court of Appeals for the Second Circuit and the Supreme Court of the United States, in connection with proceedings which resulted in the consolidation of the Long Island Lighting Company, Queensborough Gas and Electric Company and Nassau and Suffolk Lighting Company on October 24, 1950, the surviving constituent of the consolidation being the defendant herein, and I am fully informed as to the nature and scope of the proceedings had, the contentions advanced

therein, the issues presented and resolved and the identity of the various parties.

4. The gravamen of the complaint herein appears to be that the plan of consolidation of the Company and its subsidiaries approved by the S.E.C. in 1949 and by this Court and the United States Court of Appeals for the Second Circuit in 1950, and consummated in 1950, was unfair or somehow tainted with fraud because it was not based on the premise that a certain reorganization of Long Island Lighting Company in 1944 was fully effective. The plaintiffs in this action were parties to the proceedings before the S.E.C. in which the fairness of said consolidation plan was determined, were parties in the proceedings brought by the S.E.C. in 1950 in this Court for approval and enforcement of the plan, appealed the adverse decision to the United States Court of Appeals for the Second Circuit, and after losing in that Court, filed an unsuccessful petition in the Supreme Court of the United States for a writ of certiorari. As is set forth at length below, at every step in the proceedings on the consolidation plan before the S.E.C. and before the Courts the plaintiffs raised the question as to the fairness of the consolidation plan in light of the unresolved question as to the effectiveness of the 1944 plan, without success.

5. There is an implication in the complaint that the S.E.C. had no proper jurisdiction to entertain the said plan of consolidation. This question was raised by these same plaintiffs in the said proceedings in this Court to enforce the consolidation plan, on appeal in the Court of Appeals, and in their petition for a writ of certiorari. At every stage their arguments were found to be without merit.

6. There is recited below a history of the said earlier reorganization proceeding, and of the said consolidation

proceeding which in this Court was Civil Action No. 10413. The transcript of record on the appeal in that action is furnished herewith in its entirety as Exhibit A and made a part of the papers in support of this motion. Portions of said transcript of record will be referred to in this affidavit as "Record, folio ".

7. On March 27, 1936 the S.E.C. entered an order under Section 3(b) of the Public Utility Holding Company Act of 1935, granting an exemption to the Company from the registration provisions of said Act. At that time the Company was an operating public utility company as defined in said Act and had four operating public utility subsidiaries: Kings County Lighting Company; Queensborough Gas and Electric Company; a subsidiary of Queensborough Gas and Electric Company, to wit: Nassau & Suffolk Lighting Company; and a subsidiary of both Queensborough Gas and Electric Company and Nassau & Suffolk Lighting Company, to wit: Long Beach Gas Company.

In 1936 the Company suspended the payment of dividends on its preferred stock. In 1944 the Company submitted to its stockholders a reorganization plan (herein referred to as "the 1944 plan") pursuant to which the par value and current dividend rights of its preferred stock were to have been reduced by 40%; the accumulated dividend arrears were to have been unaffected; and a new issue of common stock was to have been distributed, approximately one half to the holders of its preferred stock and the balance to the holders of its old common stock. The 1944 plan was approved by the necessary vote of each class of stock as required by the New York Stock Corporation Law.

Pursuant to law, the Certificate of Reduction of Capital Stock embodying the said 1944 plan was submitted to the Public Service Commission ("the P.S.C.") for approval and endorsement. The P.S.C. after hearings adopted a memorandum opinion dated July 21, 1944 expressing dissatisfaction with the 1944 plan in certain particulars and stating that the plan was overly favorable to the holders of the old common stock. The Commission referred to the deficiency in the capital structure and distribution of voting power among the stockholders of the Company, but concluded that "the power of the Commission to remedy this condition directly is nil. The Security (*sic*) and Exchange Commission has dealt summarily with such conditions in companies under their jurisdiction, but we have no power to compel a company to readjust its stocks or voting rights in accord with what is considered sound finance and equitable considerations." Annual Report of P.S.C. for 1944, page 555.

Nevertheless, after amendment of the 1944 plan in certain minor respects, the P.S.C. by the affirmative vote of three of its five members on December 14, 1944 approved the 1944 plan. The other two members of the P.S.C., including Chairman Maltbie, refrained from voting on the ground that "the adoption of the memorandum and order at this time is premature and should not be acted upon while certain phases of this matter are in a crucial stage before the S.E.C." Annual Report of P.S.C. for 1944, page 97. This referred to a petition which certain dissenting preferred stockholders of the Company had filed with the S.E.C. on November 4, 1944 asking the S.E.C. to revoke or modify the exemption which had been granted to the Company from registration under the provisions of the Holding Company Act. On November 10, 1944 the S.E.C. instituted proceedings to determine whether said exemption should be revoked or modified. On December 16, 1944, immediately after the P.S.C. had endorsed the Certificate of Reduction of Capital Stock embodying the 1944 plan, the Company filed said Certificate in the office of the Secretary of State of the State of New York. Promptly thereafter, while the revocation proceedings were in progress and prior to any trading in the securities authorized by the said Certificate of Reduction of Capital Stock, the S.E.C. instituted an action in this Court to restrain the Company from taking any further steps to consummate the 1944 plan.

This Court entered a preliminary restraining order but, after argument on the merits, held that it had no power to grant the requested relief (59 F. Supp. 610), which decision was affirmed by the Court of Appeals (148 F. 2d 252). A petition for certiorari to the Supreme Court of the United States was granted. 324 U. S. 837. Meanwhile, said Courts continued *pendente lite* the injunction against consummation of the 1944 plan.

On April 21, 1945 the S.E.C. entered its opinion and order modifying the Company's exemption under the Holding Company Act so as to bring the reorganization of the capital structure of the system within the jurisdiction of the S.E.C. Holding Company Act Release No. 5746. On April 23, 1945 the Company complied with the said order of the S.E.C. and registered as a Holding Company under the Act to the extent required by said order.

Thereafter, on stipulation of the parties, the proceedings in the U. S. Supreme Court were dismissed as moot. 325 U. S. 833. However, the securities called for by the said reorganization plan were never issued and no further steps were taken to consummate the said plan.

On October 25, 1945 the Company filed an application with the S.E.C. under Section 11 (e) of the Holding Company Act for approval of a plan of consolidation of the Company with Queensborough Gas & Electric Company, Nassau & Suffolk Lighting Company and Long Beach Gas Company. This plan provided, among other things, for the issuance of approximately $10,000,000 par value of preferred stock to the holders of the old preferred stock of Long Island Lighting Company, and the issuance of approximately 1,059,000 shares of new common stock, of which 55,000 shares or approximately 5.2% were to have been distributed to the holders of the old common stock of Long Island Lighting Company. Application for approval of this plan was also filed with the P.S.C. After holding hearings, the P.S.C. issued a memorandum dated September 24, 1947 disapproving the said consolidation plan, one of the grounds for disapproval being that the common stockholders should receive no participation in the securities of the consolidated Company. The Commission stated, "It is as clear as bright sunshine that the common stockholders have no equity in the property, that the reconstituted companies, separately or collectively, should be solely controlled by the preferred stockholders and that the common stockholders are not entitled to any part of the securities of the consolidated system" (Record, folio 1426). The P.S.C. refused to consider the value of the common stock of the Company on the assumption that the 1944 plan had become effective. The Commission said, "The common stock was not issued by the Company within the period prescribed by the order [of December 14, 1944], the par value of the preferred stock was not reduced and the entries required by the order of December 14, 1944 were not reflected on the Company's records. Obviously, even if Long Island were permitted through some unforeseen circumstance to proceed with the formal reorganization plan, it would have to apply to this Commission for authority to issue the securities authorized in the existing Certificate of Incorporation" (Record, folio 1260).

The Company on March 10, 1948 amended its consolidation plan in an effort to meet the criticisms of the P.S.C. as expressed in the P.S.C.'s memorandum dated September 24, 1947. The amended consolidation plan provided in substance for the issuance of no new preferred stock, and included no provision for participation by the old common stockholders of the Company in the common stock of the consolidated corporation, except that out of the first earnings of the consolidated corporation, after the consolidation had been effected, there would be paid to the holders of said common stock the sum of 35¢ per share.

The P.S.C. held hearings on this amended consolidation plan and approved it except for the provisions for the payment of cash to the old common stockholders of the Company. Under the heading of "Gift to Common Stockholders," the Commission reiterated its earlier determination that the common stock should receive nothing (Record, folios 1818-1841). In fact, the P.S.C. inferred that the Company's reason for granting anything at all to the old common stock was that the Board of Directors of the Company "was elected by the common stockholder interests and that many, if not all, of the directors hold shares" (Record, folio 1841).

Subsequent to the filing of the amended consolidation plan on March 10, 1948, it was held by this Court in *Re Kings County Lighting Company*, 72 F. Supp. 767, aff'd *sub nom. Public Service Commission of New York* v. *Securities and Exchange Commission*, 166 F. 2d 784, cert. den. 334 U. S. 838, that the P.S.C. had no jurisdiction with respect to the allocation of securities of public utilities companies in the State of New York which were being reorganized under Section 11 (e) of the Holding Company Act, and that the S.E.C. had exclusive jurisdiction over such allocation of securities.

At the hearings before the S.E.C. on this amended consolidation plan, all the facts with respect to the 1944 plan were placed in evidence, and the parties took various positions with respect to the question whether said plan was legally effective for purposes of valuation of the rights of the various classes of stockholders of the Company. The position taken by the Common Stockholders Committee which had been organized in 1948 was stated by the S.E.C. to be as follows: "There can be no determination of the fairness of the plan unless it is first determined, in a separate proceeding, whether the rights of the stockholders of Long Island Lighting Company, as embodied in the Certificate of Reduction of Capital, filed in 1944, have become effective" (Record, folio 509).

In its brief before the S.E.C. dated March 31, 1949 the Company, no longer under the necessity of obtaining P.S.C. approval of the allocations as a result of the *Kings* decision referred to above, took the position that it would not object to an allocation of approximately 5% of the new common stock to the holders of the old common stock of the Company. In its findings and opinion on the consolidation plan, dated November 2, 1949, the S.E.C. discussed at length the question of the effectiveness of the 1944 plan under the heading "Fairness as between the holders of the preferred and common stocks of Long Island" (Record, folios 690-714). The S.E.C. held that for purposes of determining the fairness of allocations of new securities in the plan under the Holding Company Act, it was not necessary to make a determination of the question whether under State law the 1944 plan was in effect.

The said opinion of the S.E.C. dated November 2, 1949 concluded that if certain modifications were made, the consolidation plan would be approved. Said modifications were made, and the S.E.C. entered an order dated November 16, 1949, approving the consolidation plan as so modified.

Affidavit of Charles E. Elbert, Read in Support of Defendant's Motion for Summary Judgment

Pursuant to Section 11 (e) of the Holding Company Act, the S.E.C. applied to this Court for an order approving and enforcing the consolidation plan. Pursuant to order of the Court, the Common Stockholders Committee filed formal objections to the plan, asserting that the S.E.C. erred "in failing to make a definite finding upon the effectiveness of the 1944 recapitalization" (Record, folio 1068). This objection was supported by a brief on behalf of the Common Stockholders Committee dated December 8, 1949 enlarging on that objection. See Point VIII, pages 35-37. See also Point IV, page VIII of the Appendix to said brief which consists of a concurring brief by Mr. Aron, in which, presumably, the other Counsel for the Stockholders Committee did not participate. Mr. Aron stated, "This proceeding cannot possibly be decisive or any judgment thereon final until the Court of Appeals of New York, and possibly the Supreme Court of the United States, determine the validity or invalidity of the suppressed and disregarded, for reasons as yet undisclosed, 1944 recapitalization of Long Island."

This Court held that there was "grave question whether any legal rights were in point of fact created" by the 1944 plan, but that in any event the S.E.C. had treated the matter correctly (Record, folios 1178-1184). 89 F. Supp. 513, 526.

The decision of this Court approving the consolidation plan and ordering its enforcement, which order contained an injunction against collateral attack by any person, (Record, folio 1211) was appealed by the Common Stockholders Committee to the United States Court of Appeals for the Second Circuit. At page 12 of the brief filed by the Common Stockholders Committee on that appeal the Committee claimed that this Court erred, since "No plan for the reorganization of Long Island can be fair and equitable without a determination of the effectiveness of its 1944

Recapitalization. Both the Securities and Exchange Commission and District Court erred in approving a plan where the basic rights of the preferred and common stockholders of Long Island and their respective claims against the corporate assets are unresolved''. This point was argued in full as Point III at pages 25 and 26 of the Committee's brief. The Committee also asked the Court of Appeals, if it found contrary to the Committee's contention that the S.E.C. had jurisdiction, to remand the proceeding to the S.E.C. with instructions ''to make a definite finding upon the validity of the 1944 recapitalization'' (page 41).

The Court of Appeals treated this matter extensively in its decision dated June 1, 1950, 183 F. 2d, 45, 49, 50. The Court held:

> ''5. The 1944 Recapitalization.
>
> ''Originally Long Island and its subsidiaries were granted an exemption from registration under the Act. This exemption was revoked on April 21, 1945 by an order of the Commission entered in a proceeding initiated by a committee of preferred stockholders on November 4, 1944. In the meantime, on December 16, 1944 Long Island filed with the Secretary of State of New York a certificate for reduction of capital stock whereby among other things, the par value of Long Island's preferred stock was to be reduced from $100 to $60 per share, the outstanding 3,000,000 shares of common stock were to be cancelled and 503,800 shares of new common were to be issued on the basis of one share for each share of preferred and one share for each twelve shares of old common. A dispute arose as to whether this plan of recapitalization ever became

effective.[5] In approving the section 11 plan now before us the Commission took note of the dispute but did not determine whether the plan became effective. If it did, arrearages of dividends on the preferred stock could be paid off in 7.8 years, taking the Commission's estimate of future Long Island net yearly income as $2,815,000; if it did not, payment of the arrearages would take 14.5 years. The appellants do not assert that the recapitalization did become operative but they contend that the District Court erred in holding that the Commission was not required to determine whether or not it did.

"There is no merit in this contention. On commencement of the revocation proceeding in November 1944 the jurisdiction of the Commission over Long Island attached. Any change in its capitalization thereafter was subject to review by the Commission and, even if effective under state law, could be disregarded by the Commission in a plan filed under section 11(e), since what is 'fair and equitable' is a federal question.[6] The Commission con-

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[5] The Securities and Exchange Commission sought to restrain Long Island from carrying out the plan. A temporary injunction was denied (59 F. Supp. 610) and the order was affirmed by this Court, Judge Clark dissenting, in 148 F. 2d 252, certiorari granted 324 U. S. 837. Thereafter the certiorari was dismissed as moot, 325 U. S. 833, Long Island having registered under the Act on April 23, 1945. This Court in *West India Fruit & Steamship Co.* v. *Seatrain Lines,* 170 F. 2d 775, 779, disapproved its former decision in the *Long Island* case. The New York Public Service Commission has stated that the 1944 plan did not become effective. *In re Long Island Lighting Co.,* 73 P.U.R. (N.S.) 266, 271-2.

[6] *Schwabacher* v. *United States,* 334 U. S. 182, 198; *Securities and Exch. Comm.* v. *Central Illinois Corp.,* 338 U. S. 96, 134.

> sidered both possibilities as to the recapitalization being effective or non-effective under state law; it recognized the conflicting claims. In making what it determined to be a fair and equitable allocation of stock between the preferred and common stockholders it obviously took these claims into account. We do not think it was required to decide the merits under state law of the conflicting claims, nor that the District Court was obliged to do so."[7]

On July 24, 1950 the Common Stockholders Committee filed a petition for a writ of certiorari, alleging that the first among the questions presented was as follows: "May the Commission disregard and fail to determine the effect of a voluntary recapitalization of a utility holding and operating company which, at the time of such recapitalization, possesses an exemption from the provisions of the Act under Section 3 (a) thereof and which recapitalization is effected under State law, upon the affirmative vote of more than 66⅔% of all the stockholders affected and with the consent of the State Public Service Commission?" (page 8). Point I of the Committee's brief in support of the petition argues this contention extensively. (See pages 13-18.)

The Supreme Court of the United States denied the petition for the writ of certiorari. 340 U. S. 834.

8. The contention that the S.E.C. did not have jurisdiction over the Company and over the reorganization proceedings was raised by the plaintiffs herein when the consolidation proceedings were pending in this Court, and decided adversely to the plaintiffs (Record, folios 1121-

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[7] See *In re Electric Power & Light Corp.*, 2 Cir., 176 F. 2d 687, 692.

1125; 89 F. Supp. 513, 518, 519). The same arguments were made by the plaintiffs on appeal in the Court of Appeals, and were lost 183 F. 2d 45, 47, 48. The same arguments were one of the grounds on which the petition for the writ of certiorari was filed, which petition was denied, 340 U. S. 834.

Wherefore, it appearing that the material issues raised by the complaint herein have been raised, litigated and finally determined by this Court in prior litigation to which these plaintiffs were parties, and it further appearing that the complaint does not otherwise state a claim upon which relief may be granted, deponent respectfully prays that this Court make and enter an order awarding summary judgment in this action to defendant against the plaintiffs and make and enter an order dismissing the complaint herein for failure to state a claim upon which relief may be granted, and afford defendant such other and further relief as may be appropriate in the premises.

Charles E. Elbert

(Sworn to December 5, 1952.)

Affidavit of Harold G. Aron, Read in Oppostion to Defendant's Motion for Summary Judgment

[54-65]

UNITED STATES DISTRICT COURT

Eastern District of New York

[Same Title]

State of New York }
County of New York } ss.:

Harold G. Aron, being duly sworn, deposes and says:

I am the person named in the parallel action, made by the defendant, now before this Court. The statements made by me herein are of my personal and first hand knowledge which has come to me in my duties as counsel for the plaintiffs in all actions and proceedings on their behalf during the past five years.

The injury suffered by the plaintiffs, as stated in Paragraph Sixth of the complaint, results from a conspiracy between the defendant and certain preferred stockholders "to defeat the rights which were vested (in the plaintiffs) under the said 1944 recapitalization and to destroy the rights of the plaintiffs and other stockholders similarly situated to the 49.62% of the common stock and the rights appurtenant thereto" by

"(1) inducing certain preferred stockholders to request proceedings to be instituted in the Federal Courts by the Securities and Exchange Commission to enjoin any further enforcement of the said 1944 plan;

(2) when these proceedings were begun but were unsuccessful by waiving its exemption under the Public Utility Holding Company Act in order to defeat the State jurisdiction; and

(3) by presenting a plan to the Securities and Exchange Commission which ignored the vested rights under the 1944 plan resulting in an enforcement order of this Court destroying all but a nominal interest of the plaintiffs and stockholders similarly situated; that said actions by the defendant's predecessor were taken in bad faith to continue the old management and *said order was obtained by deception, misrepresentation, intrigue and concealment* before the Securities and Exchange Commission and this Court."

It is axiomatic that on this motion the complaint must be viewed in the light most favorable to the plaintiffs and that it is dismissible only if it is certain that the plaintiffs are entitled to no relief; that affidavits can not disprove "well pleaded facts in the complaint" and it must be shown by proof that the complaint does not "indicate any justifiable controversy." Frederick Hart & Co., Inc. v. Recordograph Corp., 3d Circuit 1948, 169 Fed. 2d 580.

As to the allegations of Paragraph Sixth, above quoted, *there is not a single relevant or material fact* set forth in defendant's affidavits, which, in substance, however disguised, amounts to a plea of *res adjudicata* and in no way factually denies, challenges or refutes the allegations of the complaint as to defendant's acts and conduct and the legal effect thereof.

Hence, no useful purpose would be served by replying to these affidavits which amount at best to a more or less accurate statement of historical and totally irrelevant facts concerning the re-organization proceeding and are, in shortest manner, disposed of by our conceding that the enforcement order of this Court in that proceeding is in all respects final and binding and that neither the SEC, nor the District Court nor the Court of Appeals were defrauded in said proceeding.

The complaint here is that *the common stockholders were defrauded* and that issue has never been presented to, much less decided by any court, and could not have been so presented or decided under the provisions of the Public Utility Holding Company Act and controlling decisions thereunder: S. E. C. vs. Central Illinois Securities Corp., 335 U. S. 328.

In the Matter of Electric Bond and Share Co., 73 Fed. Suppl. at page 426; SEC vs. Chenery Corp., 322 U. S. 196; The last words spoken by the courts in this case to date are set forth in the defendant's affidavit on the contempt motion where it presents the opinion of the Court of Appeals, dated June 24, 1952; the *per curiam* opinion says, after denying the relief sought in the petition for reargument:

> "Whether petitioners have a right to proceed by motion or independent action in the District Court without obtaining leave of this Court is a matter on which we express no opinion."

We attach hereto copies of the petition and briefs on that occasion, as submitted to the Court of Appeals.

The question here is not whether the *administrative proceedings* before SEC conform to the law and regulations prescribed by the Public Utility Holding Company Act, but by what means, duplicity and chicanery was the power granted thereunder to SEC brought into play to annihilate the rights and interests of these plaintiffs. *Until now they have had no access to the courts* beyond their necessarily feeble and scorned resistance, on a record despotically controlled by the administrative agency, to an adjudication limited as far as the courts were permitted to function to a decision whether the plan presented to them by SEC was fair and equitable without a vestige of power in the courts to alter, amend or modify or even review this modern law of the Medes and the Persians.

The defendant has made a part of the motion papers two ponderous volumes, constituting the record before the Court of Appeals. Other than to impress the Court, and incidentally to add to its burden unnecessarily, no possible good purpose can be served by this tactic. On these motions this Court is not remotely interested in the proceedings and exhibits before the SEC. The defendant goes so far as to quote from my brief before Judge Kennedy.

In that brief dated December 8, 1949 (Appendix Page 1) I made this statement:

> "It is submitted that it is the considered opinion of the undersigned that if this matter is pressed to its conclusion the result will be nugatory and the entire proceeding will prove abortive and a stupendous waste of the assets of Long Island—not to mention the unfortunate result to its stockholders and consumers. This was stated on the record on the occasion of the Committee's first appearance before the SEC which concededly in the language of its own written findings and practice has given no consideration to the Constitutional questions so raised and which it seems can not be raised here (in the District Court) under a recent decision of the United States Supreme Court in the Central Illinois Case." (338 U. S. 96)

Affidavit of Harold G. Aron, Read in Opposition to Defendant's Motion for Summary Judgment

In his opinion, Judge Kennedy made the following observation as to the brief from which the foregoing is copied:

> "On this point I can only say that the protective committee was represented before me by competent counsel who presented in great detail and with entire clarity their opposition to the plan. Their reply brief presents their contentions in racy and incisive style. * * * But more than that, the brief, and, indeed counsel's whole presentation show they were armed with full details concerning the history and structure of the company. It is difficult for me to conceive how preparation could be more complete or presentation more vigorous, if each common stockholder had paid five cents a share."

That brief is filed in this Court and deponent will be most grateful, if this Court finds time to read it, because it will make clear the anomalous position in which the Common Stockholders Committee was put by decisions sought and gained by the SEC in interpretation of the Public Utility Holding Company Act and the regulations which it adopted under it as to procedure: Only those could participate to whom its grace and consent were given; no exhibits could get into the record which it chose not to consider; no testimony could be offered which did not suit its taste; what the courts saw was what it chose them to see with great slices of material "expurgated", as in the instant matter, any reference to the Consolidated Edison's attempt with the approval of the management still in power to acquire the Long Island's assets for one half their worth; and finally with the courts completely hamstrung and able only to say *yes* or *no* to what SEC submitted, without power to change a jot or tittle of its findings and opinion. Thus confronted, the Committee and its counsel faced the dilemma: either stand mute or deliberately raise by tenders of evidence, oral arguments and briefs, fundamental objections with the full knowledge that the *only tribunal* which *could* consider or pass on them was the same administrative agency whose staff had "muscled" its way into the affairs of the entirely intra-state Long Island Lighting Company with the deliberate intent of disemboweling its common stockholders.

If reference is made to my brief quoted by the defendant, it will be found that I pointed out the obvious unconstitutionality of the Public Utility Holding Act because of the restrictions on the powers of the court, resulting from its language, as construed by the United States Supreme Court. Probably as a matter of respect and courtesy, the District Court and the Court of Appeals discussed the contentions thus made on behalf of the Committee, knowing full well as did counsel for the Committee that they were powerless to do anything about them, whether meritorious or otherwise. This confusion, resulting from the social and political philosophy which would make justice a matter of governmental administration, with resultant legislation, veneered over with a pretense of judicial proceedings, is, on this motion and before this Court, sought to be taken advantage of by the defendant in the specious argument that because certain contentions were made before the SEC, that it follows that they have been judicially decided. The only thing any court has decided in this matter is that on the facts presented to the Courts by the SEC the plan by it proposed was fair and equitable.

The other horn of the dilemma, which confronted Committee counsel was, knowing they were helpless, to stand mute and now face a defense of *res adjudicata*, estoppel and laches for not having timely called attention to the facts, which, without charging it, constituted fraud.

Affidavit of Harold G. Aron, Read in Opposition to Defendant's Motion for Summary Judgment

The motion as made, under Rule 56, can and does present no issue of law to this Court. This is made clear by the explicitness of the rule. The sole question is whether there is an issue of fact. I have examined defendant's motion papers and affidavits with care and complete familiarity with the entire proceedings and am not able to find any single controverted fact, as distinguished from counsel's conclusions of law and opinion of the merits, which are, of course, of no weight or relevancy.

One of the most salient and indisputable facts is that upon the completion, with the filing of the certificate of recapitalization, approved by the Public Service Commission on December 14, 1944, the original common stock of the Long Island Lighting Company disappeared into legal oblivion and could not be revived.

The following is copied verbatim from the opinion of the United States Court of Appeals, Second Circuit, 148 Fed. (2d) at pages 253 and 254, referring to the SEC action seeking an injunction, which was denied:

> "Prior to its inauguration, the stockholders of the appellee had voted in favor of a plan of recapitalization proposed by its management, and on February 29, 1944, pursuant to the requirements of the Stock Corporation Law, Cons. Laws c. 59 and the Public Service Law, Consol. Laws c. 48 of the State of New York, it was submitted to the Public Service Commission of New York. After extensive public hearings from March through September, the recapitalization plan was approved by the State Commission on December 14, 1944. By law, that Commission is required to withhold approval unless it finds that the plan is in the interest of investors. (284 N. Y. 626.) The appellee promptly filed its certificate of recapitalization, in the office of the Secretary of State of

> New York, in pursuance of the Stock Corporation Law. The plan became effective on such filing. (General Corporation Law, Cons. Laws, c. 23, section 8, *the rights of the stockholders under the corporate structure came to an end, trading in the old stock ceased on the New York Curb Exchange on December 16 and trading in the new stock commenced on December 18.*)" Italics supplied.
>
> Note: this decision affirmed an earlier decision of Judge Kennedy in the District Court (59 F. Supp. 610). See later decision of Judge Kennedy 84 Supp. 513.

Nowhere in this proceeding has it ever been discussed, much less explained, how a corporation with no outstanding stock and no stockholders could be re-organized under the Public Utility Holding Company Act.

To meet the clear, positive and unequivocal allegations of the complaint, the defendant was required either (1) to deny the same and go to trial on the issues of fact so raised or (2) to move under Rule 56, as it has elected to do, by showing to the satisfaction of the court by sworn, first hand competent evidence, not on information and belief, beyond possibility of even inference to the contrary, that there was here *no conspiracy, deception, intrigue, misrepresentation or concealment,* on the part of the defendant. The motion papers will be scanned in vain for any statement remotely complying with or satisfying the Rule.

The plaintiffs are prepared to prove the following facts in support of these allegations of the complaint:

(1) That in 1942 counsel for certain preferred stockholders got to work with counsel for the SEC, *including David D. Kadane, here appearing as attorney for the de-*

fendant but then employed as a member of the legal staff of the Securities & Exchange Commission in the Public Utility Division. Mr. Kadane had charge of the administration of the Public Utility Holding Company Act; he and counsel for the preferred stockholders had as their objective the task of finding or "inventing" some means of getting rid of the common stockholders of Long Island Lighting Company, whose stock had the sole voting right, by getting the SEC into the situation as the only means of accomplishing their ends; that these conversations in which counsel for the defendant at some time participated resulted in the SEC making an application to this Court (after trading in the stock of the Long Island Lighting Company had ceased and the 1944 Recapitalization had been completed to the point where certificates for the new stock were about to be issued in exchange for certificates of deposit then outstanding) for an injunction to prevent the further consummation of the plan, which while never obtained permitted the defendant to hold up further action until SEC with its acquiescence could in form revoke its exemption from the Public Utility Holding Company Act *and put it in a position where it would voluntarily consent thereto* and submit itself to the proceedings by which these plaintiffs six years later were stripped of rights that today possess a value of at least $27,500,000.

(2) Some time after 1946 David K. Kadane became general counsel for the defendant and thereafter directed and conducted the proceedings recited in the defendant's affidavits, succeeding Charles G. Blakeslee, who had earlier resigned as general counsel for the Public Service Commission of New York to become general counsel for the defendant, while it was subject to the sole jurisdiction of the Public Service Commission with which it was in constant difficulties.

Affidavit of Harold G. Aron, Read in Opposition to Defendant's Motion for Summary Judgment

(3) In the proceedings before the SEC, the defendant deliberately and in order to destroy their opposition induced the SEC to deny these plaintiffs the right from their own numbers to raise any funds to employ counsel or experts for the defense of their rights.

(4) In the proceedings before the SEC, the defendant induced the SEC to withhold its consent to the holding of any stockholders meeting for the election of directors of the Long Island Lighting Company until after the SEC had rendered its decision in the re-organization proceedings and was thereby in a position to enjoin the holding of any such meeting, although no meeting of the stockholders had been called or permitted by the management and directors of the LILCO since 1944.

(5) On the completion of the re-organization proceedings herein and upon the taking effect of the enforcement order of this Court, at the stockholders meeting of the re-organized consolidated company all of the officers of the old company were elected to office reportedly at increased compensation; Percival E. Jackson, who had been counsel for the Preferred Stockholders Committee on the re-organization proceedings was added to the Board, the salary of the re-elected president Edward P. Barrett who engineered the totally unnecessary and voluntary re-organization, was fixed at $62,600, and David K. Kadane was chosen general counsel at an annual salary several times that which he received as a member of the legal staff of the SEC when he was employed on its behalf in the reorganization proceedings, described in defendant's action papers.

(6) In the proceedings before the SEC, and, hence before this Court the defendant falsely represented that there was a deficiency of $10,000,000 in depreciation reserves, whereas in truth and in fact there was no such deficiency.

(7) In the proceedings before SEC, and hence before this Court, the defendant falsely represented that the reasonably to be expected maximum annual earnings from the new and consolidated Long Island Lighting Company would not exceed $3,500,000, whereas in fact its annual earnings now exceed $6,000,000 and were close to $5,000,000 at the time the enforcement order of this Court was affirmed, less than a year after SEC made its finding in accord with this misrepresentation.

(8) In the proceedings before the SEC, the defendant accepted an offer of the Consolidated Edison Company to pay approximately $28,000,000 for all its assets, which were at the time worth, not less than twice that amount as was demonstrable at that time, which was successfully opposed by these plaintiffs.

(9) In the proceedings before the SEC the defendant represented that it would take the Company 14½ years to pay off its accrued preferred stock dividends, whereas in fact the earnings of the Company have been such as to have already paid off said accrued dividends and left the old common stock of these plaintiffs in sole possession of the Long Island Lighting Company.

(10) As a result of the proceedings before the SEC, all of the attorneys for and representatives of, the preferred stockholders who worked with the Company to subject it to the Public Utility Holding Company Act have been paid by the defendant large fees, aggregating close to a quarter of a million dollars and the banking firm of the Chairman of the Preferred Stockholders Committee has been permitted to buy with huge profits a large block of the Company's securities without public bidding at a negotiated sale price.

(11) By every artifice known to guerrila legal tactics, the defendant has prevented, avoided and evaded any sub-

mission to any court at any time, hence, any decision thereon, the vital question at the root of this whole affair, namely, *the validity of the 1944 Recapitalization.* This is the supreme accomplishment of the conspiracy, intrigue and concealment alleged in the complaint, and as yet unanswered, since, if property rights vested in these plaintiffs thereunder, their despoilation is irrefragable. The defendant has irretrievably succeeded in divesting these plaintiffs of their rights and property, but it is inconceivable that as a result the defendant is right in the assertion of its notice of motion that facts in the complaint alleged and not here controverted fail "to state a claim on which relief may be granted."

As a matter of simple justice and constitutional right, the *facts* alleged in this complaint, and as yet unchallenged, denied or disputed should be left to a jury for determination on the clear issue whether or not they prove the existence of a scheme to defraud these plaintiffs of substantially a half interest in the rapidly growing, increasingly profitable defendant, by deception, intrigue, misrepresentation and concealment, through the device of using an administrative agency of the United States government, to dissolve the corporation without notice to the common stockholders or their action or consent and thereby confiscate and obliterate property owned by them of a value *two years later* of more than $27,500,000.

It is respectfully submitted that this case is akin to that of Bogert v. Southern Pacific Company, originally decided in this Court and affirmed by a most distinguished bench in the Court of Appeals in 1917 and reported in 244 Fed. Reporter at page 63.

Harold G. Aron

(Sworn to December 16, 1952.)

Exhibit A, Annexed to Affidavit of Harold G. Aron

[66]

BRIEF IN SUPPORT OF PETITION BY COMMON STOCKHOLDERS' COMMITTEE OF LONG ISLAND LIGHTING COMPANY, ET ANO, FOR AN ORDER SETTING ASIDE THE ORDER OF THIS COURT, DATED JULY 5, 1950, WHICH AFFIRMED, AS MODIFIED, THE AMENDED PLAN OF REORGANIZATION OF LONG ISLAND LIGHTING COMPANY, ETC.

(Omitted pursuant to stipulation; copies thereof to be handed up to the Court upon the argument of the appeal.)

Exhibit B, Annexed to Affidavit of Harold G. Aron

[67]

PETITION FOR REHEARING OF MATTER REFERRED TO IN EXHIBIT A

(Omitted pursuant to stipulation; copies thereof to be handed up to the Court upon the argument of the appeal.)

Exhibit C, Annexed to Affidavit of Harold G. Aron

[68]

ORDER TO SHOW CAUSE AND PETITION IN MATTER REFERRED TO IN EXHIBIT A

(Omitted pursuant to stipulation; copies thereof to be handed up to the Court upon the argument of the appeal.)

Notice of Motion of Securities and Exchange Commission for Leave to Intervene and to Dismiss the Action, etc.

[73-74]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

PLEASE TAKE NOTICE that upon the complaint herein, the annexed affidavit of Solomon Freedman, and upon the notice of motion of Long Island Lighting Company, defendant herein, and the affidavit attached thereto, the Securities and Exchange Commission, upon presentation of said motion of Long Island Lighting Company, returnable December 17, 1952, will move the Court for leave to intervene in this action pursuant to Rule 24(b) of the Federal Rules of Civil Procedure and for an order which will:

1. Dismiss the action herein as filed in violation of this Court's order of February 17, 1950, in Civil Action No. 10413, without prejudice to the consideration, pursuant to the Court's reserved jurisdiction in said Action No. 10413, of any contentions that said order therein should be vacated or modified by reason of allegations set forth in the complaint herein.
2. Afford such other and further relief as may be appropriate in the premises.

PLEASE TAKE FURTHER NOTICE that, in the absence of waiver of the time for notice otherwise prescribed by Rule 6(d) of the Federal Rules of Civil Procedure, the Commission will request on said return date that the Court shorten said period of notice pursuant to the above Rule, so that its motion may be heard at the same time as the motion of Long Island Lighting Company.

Roger S. Foster
General Counsel

Solomon Freedman
Special Counsel
Securities and Exchange Commission
425 Second Street, N. W.
Washington, D. C.

Dated: December 11, 1952.

To:
Harold G. Aron, Esq.
and
Armstrong & Keith, Esqs.,
76 Beaver Street,
New York, New York.

David K. Kadane, Esq.,
250 Old Country Road,
Mineola, New York.

Affidavit of Solomon Freedman, Read in Support of Motion of Securities and Exchange Commission for Leave to Intervene and to Dismiss the Action, etc.

[75-77]

UNITED STATES DISTRICT COURT

OF THE EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

WASHINGTON
DISTRICT OF COLUMBIA } ss.:

SOLOMON FREEDMAN, being duly sworn, deposes and says:

1. I am an attorney and Assistant Director, Division of Public Utilities, Securities and Exchange Commission, and I am fully familiar with the facts and circumstances of this case.

2. The Securities and Exchange Commission, pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935, had initiated the proceedings in this Court to enforce a plan of reorganization in respect of Long Island Lighting Company and some of its subsidiaries in the case entitled, *In the Matter of Long Island Lighting Company, et al.*, Civil Action No. 10413.

3. The order of this Court, entered on February 17, 1950 in the aforesaid action, approving and enforcing the plan of reorganization provided, in paragraph (7) that upon consummation of the plan of reorganization "all rights, interests and claims of the stockholders of Long Island Lighting Company * * * shall cease and determine"

except for the participation provided for them under the plan. Said plan has long since been consummated.

4. The aforesaid order further provided:

> "(10) Long Island Lighting Company, Queens Borough Gas and Electric Company and Nassau & Suffolk Lighting Company, and all their creditors and security holders, and all other persons be, and they are hereby, enjoined and restrained from doing any act or taking any action interfering with, or tending to interfere with, these proceedings or with the enforcement and carrying out of the Amended Plan or any part thereof or compliance with the Order of the Securities and Exchange Commission dated November 16, 1949, or this Order, including the commencement or prosecution of any action, suit or proceeding, at law or in equity, or under any statute, in any court or before any executive or administrative officer, commission or tribunal, other than such proceedings before the Commission or this Court as may be authorized by the Act or the Rules and Regulations promulgated thereunder, and such review, if any, in an appropriate Court of Appeals as may be provided by law."

5. The aforesaid order further provided:

> "(11) The Court reserves jurisdiction to entertain such further proceedings, to make such further findings, to enter such supplemental orders or decrees and to grant such other and further relief as may be necessary or appropriate to carry out the provisions of the Amended Plan or the transactions incident thereto."

Affidavit of Solomon Freedman, Read in Support of Motion of Securities and Exchange Commission for Leave to Intervene and to Dismiss the Action, etc.

6. The complaint in the action herein involves an attempt to obtain for the common stockholders of Long Island Lighting Company a participation in excess of that accorded to them under the plan and is an attack upon the merits and validity of the plan of reorganization as approved by order of the Commission and enforced by this Court. As such, the bringing of the action herein violates the order of this Court dated February 17, 1950 as quoted hereinabove.

WHEREFORE, the Commission requests leave to intervene pursuant to Rule 24(b) of the Federal Rules of Civil Procedure and for an order granting the relief set forth in the accompanying notice of motion.

/s/ SOLOMON FREEDMAN
Securities and Exchange Commission
425 Second Street, N. W.
Washington 25, D. C.

(Sworn to December 11, 1952.)

Notice of Motion of Securities and Exchange Commission for a Determination That the Action Violates the Order of District Court, Dated February 17, 1950, etc.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

In the Matter

of

LONG ISLAND LIGHTING COMPANY, QUEENS BOROUGH GAS & ELECTRIC COMPANY, NASSAU & SUFFOLK LIGHTING COMPANY.

PLEASE TAKE NOTICE that upon the complaint herein and upon the notice of motion herein of Long Island Lighting Company, dated December 5, 1952, and the affidavits accompanying said notice as well as the record heretofore had in this proceeding, the Securities and Exchange Commission, upon the presentation of said motion of Long Island Lighting Company, returnable December 17, 1952, as a party in this proceeding, will move the Court as follows:

1. For a determination that the filing of the complaint in Civil Action No. 13054 violates this Court's order of February 17, 1950, and that the continued prosecution of said complaint as an independent action will constitute further violation of said order; and
2. That the Court take appropriate action to cause said complaint in No. 13054 to be dismissed as an independent action; and

3. That the Court in the exercise of its exclusive jurisdiction under Section 11(e) of the Public Utility Holding Company Act, and except as such jurisdiction may be limited as a result of the proceedings on appeal from the order of February 17, 1950, take cognizance of the charge in said complaint in Civil Action No. 13054, that this Court's order of February 17, 1950, "was obtained by deception, intrigue, misrepresentation, and concealment before the Securities and Exchange Commission and this Court" to the same extent as though said complaint were filed in this proceeding; and

4. That the charges of fraud set forth in said complaint do not state grounds for vacating or modifying this Court's order of February 17, 1950, or for permitting any payment to common stockholders of Long Island Lighting Company as theretofore constituted in addition to the participation accorded them in the plan enforced by said order; and that, in the absence of an amendment supplying further and relevant particulars, pursuant to Rule 9(b) of the Federal Rules of Civil Procedure, said charges of fraud are without merit; and

5. For such other and further relief as may be appropriate in the premises.

Please take further notice that in the absence of waiver of the time for notice otherwise prescribed by Rule 6(d) of the Federal Rules of Civil Procedure, the Commission will request on said return date that the Court shorten said period of notice pursuant to the above Rule, so that its motion may be heard at the same time as the motion of Long Island Lighting Company.

Dated: December 11, 1952.

Roger S. Foster,
General Counsel.

Solomon Freedman,
Attorney,
Securities and Exchange Commission,
425 Second Street, N. W.,
Washington 25, D. C.

To:

David K. Kadane, Esq.,
250 Old Country Road,
Mineola, New York.

Harold G. Aron and
Armstrong & Keith, Esqs.,
76 Beaver Street,
New York, New York.

Affidavit of Harold G. Aron, Read in Opposition to Motions of Securities and Exchange Commission

[82-86]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

HAROLD G. ARON, being duly sworn, deposes and says:

I am one of the attorneys for the plaintiffs above named in Civil Action No. 13054 and appeared for the plaintiffs in the proceedings referred to in Civil Action No. 10413.

On Friday last, December 12th, plaintiffs' attorneys were served by mail with two papers, each designated as a Notice of Motion, one under each of the above captions. Precisely one week earlier, after the close of business, on Friday, December 5th, there were left under the door of Room 1600, 76 Beaver Street, office of Armstrong & Keith, two papers designated as Notices of Motion made by the defendant in the above entitled actions. All said motions were returnable on December 17, 1952; action No. 13054 was begun November 19, 1952.

The SEC motion entitled in action No. 10413 purports to be made *"upon the complaint herein"*. There is no such action pending and there never was a complaint therein. I allude to this not by way of objection to the motion being heard but in order to illuminate the egregious folly of the position of the defendant and its ally in pleading a disguised defense of *res adjudicata* by a kind of "shell game" between two actions, involving completely different issues between totally different parties, arising eight years apart.

Plaintiffs do not object to the advent and participation of the Securities and Exchange Commission, if it feels that its honor, prestige or competence are involved, although no such charge or insinuation has at any time been made by or on behalf of the plaintiffs, in No. 13054, *provided* the Court finds any law or authority permitting the Securities and Exchange Commission here to intervene. I have not been able to find the slightest vestige of such law or authortiy or any remotely applicable precedent, and none is referred to in the moving papers.

As the affidavit of Solomon Freedman states concerning the proceedings before the SEC and the resultant plan of re-organization: *"Said plan has long since been consummated."* As a matter of law and fact, admitted by the SEC, it has long since *ceased to have any jurisdiction over the Long Island Lighting Company* under the Public Utility Holding Company Act.

Solomon Freedman, herein designated as the now Assistant Director of the Division of Public Utilities, Securities and Exchange Commission, is the person to whom I was referred, when I was first retained in this matter in 1947, as the member of the staff in charge of the Long Island Lighting Company re-organization, when, seeking information, I called in person at the then office of the Securities and Exchange Commission in Philadelphia. I was informed that he was the staff attorney "now handling the matter", having presumably succeeded David K. Kadane who resigned from the SEC at the end of 1946, later to become assistant general counsel of the Long Island Lighting Company and its general counsel in 1951. Mr. Freedman continued to direct and conduct the proceedings, after the Common Stockholders Committee, which I represented, was given special permission by SEC to participate in the proceedings in 1948, prior to which there had been no representation of the common stockholders, although they numbered over 10,000 and possessed the sole voting rights in the Long Island Lighting Company. Mr. Freedman continued to direct and conduct the proceedings before the SEC in every aspect up to the final action by the United States Supreme Court in 1951, and is, as he states, fully familiar "with the facts and circumstances of this case."

Nevertheless, Mr. Freedman fails or is unwilling to perceive that SEC is not in the slightest way concerned in Civil Action No. 13054 or that this action does not remotely question or attack, much less affect or impair the results of his and Mr. Kadane's labors begun in 1944, as they fructified in the re-organization of Long Island Lighting Company, as it became effective *October 24, 1950.*

Mr. Freedman here appears in No. 10413 as attorney for SEC and in No. 13054 as *Special Counsel* for SEC precisely the role Mr. Kadane filled when in 1944 SEC came into this Court seeking to enjoin the completed 1944 Recapitalization of Long Island.

It is true that SEC, by express and limited reservation, retained jurisdiction over the re-organization proceedings, for the sole and stated purpose of approving counsel fees and expenses, which the Long Island Lighting Company was obligated to pay in the re-organization proceedings and that Mr. Freedman was and is in charge of that matter, which now remains open only to the extent that while all other fees and expenses of all participants have been approved and paid for by Long Island Lighting Company, no payment of any kind, for services of myself as counsel for the Committee or for out of pocket expenses and services of the members of the Committee, has been approved by the SEC or paid by Long Island Lighting Company, although in part incurred as much as five years ago. But certainly this reservation of power by the SEC does not create any more interest in the SEC in the pending action No. 13054, than that of the Public Administrator as to the payment of the funeral expenses of a deserted and destitute corpse.

I am completely unable to fathom the reasoning advanced in Paragraph 3 of Mr. Freedman's affidavit, which quotes from Paragraph 7 of the enforcement order of this Court that part which provides that upon consummation of the plan of re-organization "all rights, interests and claims of stockholders of Long Island Lighting Company shall cease and determine."

In the Southern Pacific Company case, adverted to in my accompanying affidavit, all "rights, interests and claims" of the common stockholders had "ceased" twenty-five years before *this Court* entered a compensatory judgment in their favor. That these plaintiffs fully understood the meaning and effect of this Paragraph 7 of the enforcement order is shown by their effort, in order to clear the way for this action as set forth in my accompanying affidavit, to procure a re-argument and re-hearing in the Court of Appeals, which had first reversed and remanded the enforcement order of this Court and then retracted, at the insistence of SEC. Had the rights of these plaintiffs not "ceased" and "been determined," and had they and their counsel not fully realized this, the action in which the instant motions are made would not be here.

The plaintiffs are suing, in a proper class action, as defrauded individuals, because their "rights, interests and claims" as stockholders of the Long Island Lighting Company have *ceased* and been *determined*.

But that is not to say that they are without remedy, and such clearly is not the inference to be drawn from the very last words which the Courts have spoken in this matter up to this moment. Certainly there is nowhere to be found in this case anything to justify the last two lines of the rider, referred to in defendants' affidavits as having been ordered added to the recent $20,000,000 bond issue prospectus by the SEC. A photostat of that rider is shown on the photostat annexation to my affidavit in opposition to the contempt motion. As soon as it came to my attention I telegraphed the SEC calling attention to these sentences and suggesting that they be re-checked and verified for accuracy but I am advised in writing that the Commission considered my telegram but decided to take no further action.

Harold G. Aron.

(Sworn to December 16, 1952.)

Opinion of Inch, *D. J.*, Denying Defendant's Motion for Summary Judgment

[41]

Motion denied. See memorandum on companion motion decided herewith. Submit order.

December 30, 1952.

R. A. Inch
U. S. D. J.

Opinion of Inch, *D. J.*, Granting Motions of Securities and Exchange Commission to Intervene and to Dismiss the Action, etc.

[72]

The Securities and Exchange Commission is granted leave to intervene herein, and the motion to dismiss the action on the ground that it violates the order of this Court of February 17, 1950 in Civil Action #10413 is granted, without prejudice to any further proceeding which plaintiffs may desire to undertake, pursuant to the Court's reserved jurisdiction in said action #10413 to vacate or modify said order by reason of the allegations set forth in the complaint herein. Settle order.

December 30, 1952.

Robert A. Inch
U. S. D. J.

Opinion of Inch, *D. J.*, Denying Motion of Securities and Exchange Commission for a Determination That the Action Violates the Order of District Court, Dated February 17, 1950, etc.

[69]

Motion denied. See memorandum on companion motion decided herewith. Submit order.

December 30, 1952.

Robert A. Inch
U. S. D. J.

Order Denying Defendant's Motion for Summary Judgment, Appealed From

[53]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

A Motion having been made by defendant herein for summary judgment or for dismissal of the action for failure of the complaint to state a claim upon which relief may be granted, and, a motion having been made herein by intervenor Securities and Exchange Commission for dismissal of the action on the ground that same was brought in violation of a certain injunction order of this Court, dated February 17, 1950 in Civil Action No. 10413, and the said motions having duly come on to be heard before this Court at a motion part thereof, held at the United States Court House for the Eastern District of New York, 271 Washington Street, Borough of Brooklyn, City and State of New York on the 17th day of December, 1952, and the said motion of the intervenor Securities and Exchange Commission having been granted, now, therefore, it is

ORDERED, that defendant's motion be denied, without prejudice to a renewal of same in any further suit on the claim set forth in the complaint.

(Sgd) ROBERT A. INCH
United States District Judge

January 12, 1953.

Order Granting Motion of Securities and Exchange Commission to Intervene and to Dismiss the Action etc., Appealed From

[79-80]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

The Securities and Exchange Commission having moved for leave to intervene in the action herein pursuant to Rule 24(b) of the Federal Rules of Civil Procedure and to have the action herein dismissed on the ground that it violates the order of this Court entered on February 17, 1950 in an action entitled, *In the Matter of Long Island Lighting Company, et al.,* Civil Action No. 10413, and this Court having heard argument on December 17, 1952, and having issued its memorandum dated December 30, 1952, it is

ORDERED, that the motion of the Securities and Exchange Commission for leave to intervene be, and it hereby is, granted; and

IT IS FURTHER ORDERED, that the motion of the Securities and Exchange Commission to dismiss the action herein be, and it hereby is, granted, without prejudice to any further proceedings which the plaintiffs herein may desire to undertake, pursuant to this Court's reserved jurisdiction in said Civil Action No. 10,413, to vacate or modify the order in the aforesaid action by reason of the allegations set forth in the complaint herein.

ROBERT A. INCH
United States District Judge

January 22nd, 1953.

Notice of Appeal From Order Denying Defendant's Motion for Summary Judgment

[94-95]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

NOTICE is hereby given that Ennis M. Nichols, individually and on behalf of other stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company and Common Stockholders Committee of Long Island Lighting Company, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the order of this Court, entered in this action on the 12th day of January, 1953, which said order on its face appears to deny the motion of the defendant Long Island Lighting Company for summary judgment or for dismissal of the action for failure of the complaint to state a claim upon which relief may be granted, but which order in substance and effect actually appears to grant or results in the granting of said defendant's motion for summary judgment or dismissal of the action, and which said order recites that the motion of the Security & Exchange Commission for leave to intervene and for dismissal of the action on the ground that same was brought in violation of a certain injunction order of this Court, dated February 17, 1950, in Civil Action No. 10413, had been granted.

Harold G. Aron and
Armstrong & Keith,
76 Beaver Street,
New York, N. Y.;

Kadel, Wilson & Potts,
30 Broad Street,
New York, N. Y.,

Attorneys for Appellants,

By Harold G. Aron.

Notice of Appeal From Order Granting Motion of Securities and Exchange Commission to Intervene and to Dismiss Action, etc.

[93]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[Same Title]

Notice is hereby given that Ennis M. Nichols, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company and Common Stockholders Committee of Long Island Lighting

Company, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from so much of the order of this Court, entered in this action on the 22nd day of January, 1953, which granted the motion of the Securities and Exchange Commission, intervenor herein, and dismissed the action herein, without prejudice to any further proceedings which the plaintiffs herein may desire to undertake, pursuant to this Court's reserved jurisdiction, in Civil Action No. 10,413, entitled *In the Matter of Long Island Lighting Company, et al.*, to vacate or modify the prior order of this Court entered on February 17, 1950 in the aforesaid Civil Action No. 10,413, by reason of the allegations set forth in the complaint herein.

Harold G. Aron and
Armstrong & Keith,
76 Beaver Street,
New York, N. Y.;

Kadel, Wilson & Potts,
30 Broad Street,
New York, N. Y.,

Attorneys for Appellants,

By Harold G. Aron.

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Supreme Court, U
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AUG 14 1954
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Supreme Court of the United States

October Term, 1954
No. 188

Ennis M. Nichols, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and Common Stockholders Committee of Long Island Lighting Company,

Petitioners,

against

Long Island Lighting Company,

Respondent.

Securities & Exchange Commission,

Respondent.

PETITIONER'S REPLY TO THE RESPONDENTS' BRIEFS

Harold G. Aron,
Attorney for Petitioners.

Supreme Printing Co., Inc., 114 Worth Street, N. Y. 13, BEekman 3-2320
49

Supreme Court of the United States

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No. 188

Ennis M. Nichols, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and Common Stockholders Committee of Long Island Lighting Company,

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PETITIONER'S REPLY TO THE RESPONDENTS' BRIEFS

This reply brief of the Petitioners is respectively addressed to the briefs of the Securities & Exchange Commission (sometimes hereinafter called "S.E.C.") and Long Island Lighting Company (sometimes hereinafter called "Company").

The brief of the S.E.C., which bears only the names, as counsel, of the same attorneys for the S.E.C. who have appeared in the prior briefs in this matter reduces to a single argument:

> Because the courts below have refused to sustain the Petitioners' position, this Court must assume that there has been no error and deny the petition. It is unnecessary to observe that this Court has, on occasion, found the courts below in error and reversed their decisions.

The noteworthy feature of the S.E.C. brief is that it neither challenges nor disputes a single fact or statement made in the petition as we shall point out specifically in Point I of this reply brief.

Point II of this reply deals with the incredible contention, incredible because coming from such high sources as that of an important government agency, of the apparently serious proposition that eleven thousand citizens and nationals of the United States can be constitutionally barred from all the courts of the United States judicial system and from any trial or hearing of a judicially sanctioned complaint in a common law action for fraud and conspiracy, resulting to their damage of $27,500,000.

It is a matter of regret that in Point III of this reply to a governmental agency, nominally the Solicitor General of the United States, we are obliged to point out inaccuracies of statement which go beyond the boundaries of legitimate advocacy.

In Point IV of this reply we are compelled to deal with positive and deliberate misstatements of the record made by counsel for the Company.

POINT I

The brief of the S.E.C. makes no reference to and contains no challenges or denial of the following statements in the petition before this Court:

> 1. "As a result of this enforcement order, the petitioners' interest in the reorganized company was reduced from 49.7% in the original Long Island Lighting Company, to 5.7% in the reorganized company, at a time when the net earnings of this utilities system had passed four million ($4,000,000.) dollars annually" (p. 2).
>
> 2. The allegations of the complaint are:
>
> "* * * evidenced by written communications in 1942 and the subsequent employment by the defendant (Company) of one of S.E.C.'s attorneys, and as such in charge of the reorganization proceeding, who here appears as sole attorney for the defendant, the reorganized Long Island Lighting Company, * * *" (p. 2).
>
> 3. "* * * proof of fraud and conspiracy in the reorganization proceeding was not disclosed, detected or known by these petitioners until more than a year after the completion of the reorganization proceeding by S.E.C. and the Courts, and, hence, could not possibly be subject to the rule of res judicata" (p. 3).
>
> "(a) That after the New York State Recapitalization of 1944, the common stockholders were not only not permitted but prevented from holding any meeting, although they were vested with the sole voting power" (p. 10).
>
> "(b) That the Long Island Lighting Company management concealed until 1948 all actual notice from the stockholders of the proceedings begun in 1944 before the SEC, the PSC, the United States District Court and the United States Court of Appeal" (p. 10).
>
> "(c) That the Company's earning power and depreciation reserve were misrepresented to the SEC, and the common stockholders were

deprived, through the machinations of Long Island Lighting Company, of any chance to raise the necessary funds for expert services and testimony as to the true state of the depreciation reserve'' (p. 10).

''(d) That there was deliberate concealment of pending proceeding before the PSC as to the depreciation reserve, at the time this Court affirmed the enforcement order, by which time proceedings instituted by Long Island Lighting Company a year earlier had reached a point where a reduction of $3,000,000 was a practical certainty'' (p. 10).

''(e) That there was deliberate concealment of the fact that, when this Court affirmed the enforcement order that the company's net earnings had already exceeded by a half a million dollars the estimate of annual earnings on which the reorganization was based and on which this Court affirmed the enforcement order'' (p. 11).

''(h) That, projected in 1942, as shown by an exchange of correspondence between Duff & Phelps (recognized public utility engineers of Chicago, George S. Munson, an outstanding lawyer of Philadelphia, based upon an entirely correct and proper opinion of Messrs. Shearman & Sterling of New York, there was devised by one Milton S. Pollack, Esqs., a lawyer of this city and a self-constituted committee of preferred stockholders, represented by the firm of Unger & Pollack, a scheme, activated in 1944, to wipe out the common stockholders with 5% of the common stock of proposed reorganized company, to that extent to confiscate their property rights, to dissolve the company without their knowledge or consent, in the process to 'black out' their voting rights, which controlled the company, by the deliberate and admitted 'invention' of spurious grounds of superseding jurisdiction in the SEC, replacing the PSC of New York, of which the following is indicative, quoted from a printed brief of *David K. Kadane,* submitted on the fee hearings by him as general counsel for the Long Island Lighting Company to which position he was appointed in 1946, having originally appeared in this matter before this Court in 1944 as Special Counsel for the SEC; brief dated June 8, 1951:

* * *

'Pollock expressed as the "vital aspect" of their services the organization of the preferred stockholders, the "arousing of the New York Commission, the negotiations with the Company, the creation of an atmosphere of pressure which forced the company to make a move towards a plan, and the *"invention" of grounds of interstate commerce* which would support the Commission's jurisdiction (S. M. (79-80) * * *'' (pp. 12, 13).

"(i) That the surreptitious and ultra vires, as far as the officers and Board of Directors was concerned, surrender of Long Island's 8-year-old and invaluable exemptions from the Public Utility Holding Companies Act was a premeditated and advised design to prevent an affirmance by the United States Supreme Court of the decision of this Court, barring SEC from interferring with the completed recapitalization of Long Island Lighting under the laws of New York and obliterating the statutory powers and duties of its Public Service Commission" (p. 13).

"(k) That the secret, overnight and ultra vires action of the Long Island Board of Directors and management, to sell the Long Island lock, stock and barrel at half its known and provable value was designed as a part of the conspiracy unjustly to enrich the salaried management of Long Island Lighting Company at a prodigious loss to the common stockholders, in flagrant violation of the statutory and common law fiduciary duties as the directors and officers" (p. 14).

POINT II

No where in the brief of the S.E.C. is it contended or even implied that there has been any vestige or pretense of judicial hearing or trial of the charges of fraud and conspiracy sworn to and filed in formal complaint by these Petitioners. Concededly there has been no trial in any tribunal of the now finally dismissed common law court action. We doubt that such has heretofore happened in Anglo-Saxon jurisprudence since the days of King John.

To meet this stark and staggering fact the S.E.C. resorts to two explanations:

> First—That the Petitioners are enjoined from bringing such action or attacking collaterally the decree enforcing the order of the S.E.C. in the reorganization proceedings of the Company.

On at least a dozen occasions in the courts below in unqualified and positive statements, in the simplest of English, in briefs and oral argument over the past two years since the complaint now here was filed, we have pointed out that the complaint is based on the non-assailability and finality of the enforcement decree. If that decree were subject to collateral attack, these Petitioners would have no cause of action and this petition would not be here. Counsel for Petitioners did originally move to vacate the decree on the ground that the courts below had been defrauded. The Court of Appeals felt otherwise and denied the motion and counsel for Petitioners have that modicum of intelligence to cause them to realize that instanter, with that decision, the final decree in the reorganization of the Company became as changeless as the laws of the Medes and the Persians. That the Court of Appeals below did not grasp this point is perhaps understandable, in view of the fact that the Petitioners' counsel was accorded on argument only forty-five minutes to review the ponderous record, analyze the twelve prior decisions in the reorganization proceeding and present the appellant's argument; but it is inconceivable that after two years the legion of government counsel engaged in this matter should have the mendacity to contend that these Petitioners must be denied any trial because their complaint is a collateral attack on the final decree in the reorganization proceeding, whereas in law and fact that decree is the *sine qua non* of the Petitioners' complaint, which has been denied trial or hearing.

> Second—As a second explanation, S.E.C.'s brief pleads *res judicata.*

Here again we have tried repeatedly not to argue, but to demonstrate, as we once more do in a later section of this reply, that the fraud and conspiracy on which the complaint now here is based were not discovered by these Petitioners until two years after the enforcement decree had become final and could not possibly have been presented to, much less heard or tried by any court or administrative agency for that final decree became final.

POINT III

S.E.C. counsel go beyond the proprieties in making the following assertions (the references are to the pages of their brief):

> Page 8. The statement is made: "The so-called conspiracy is said to have arisen from the abandonment of a plan of recapitalization for Long Island referred to as 'the 1944 plan' devised by Long Island under New York law * * *."

Had the 1944 reorganization which S.E.C. claims "was prejudicial to the preferred stockholders", not been sabotaged and torpedoed by the fraud and conspiracy charged in the unheard and untried complaint now here, the preferred stockholders would long since have received their accrued dividends in full and would now own equally, save for a slight fraction in their favor, with these Petitioners, the equity in the fastest growing utility company in the

United States, as was obvious and foreseen at the time of the inception of the conspiracy by the less than 1% stock-owning management and directors of the Company—now earning over $10,000,000 a year, indicating an equity worth at least $70,000,000 at present New York Stock Exchange quotations for the common stock.

> Page 9: On this page the statement is made that "* * * no review of the order (of S.E.C. by which Long Island as part of the fraud and conspiracy here charged surreptitiously and without notice to its stockholders surrendered its exemption from the PUHCA) was sought by Long Island or its stockholders."

Mirabile dictu—the directors and management of the Company and its preferred stockholders plotted this. The common stockholders knew nothing about it, had no notice of it or at the time any suspicion of the intrigue behind it.

> Page 10: The statement is made as to Petitioners' cause of action that the defendant "conspired with certain preferred stockholders * * * to defeat 'those rights, and carried out the conspiracy (1) by inducing certain preferred stockholders to persuade the Securities & Exchange Commission to block consumation of the 1944 plan; (2) by failing to contest the revocation of the exemption; and (3) by submitting a plan under Section 11 (e) of the act which did not recognize 'the vested right under the 1944 plan.' (R. 3a-4a)."

The fact is, as these Petitioners have alleged and will prove, that the entire scheme originated in the S.E.C., under the guidance of David K. Kadane, then Special Counsel for S.E.C., in initiating the proceeding and since 1946 attorney and then General Counsel for the Company, retained and employed by the same directors and management which activated the fraud and conspiracy charged in the complaint.

The comment is made on this page that the complaint is "without any supporting particulars." For nearly two years the defendant, Long Island Lighting Company, has been in a position to demand those particulars and to examine the Petitioners before trial. The complaint admittedly does not plead evidence.

> Page 11: The statement is made referring to a decision in 89 Fed. Sup. at 518-519 and 183 F. 2d at 47-48, namely, "The same issues are raised in the complaint herein."

This statement is an affront to the intelligence of this Court, as a comparison of the complaint and the decisions cited will show.

Page 12 reveals the confusion of the courts below in dealing with this matter. The Court of Appeals, in its first decision in the *reorganization proceeding,* reversed the District Court's enforcement order; then reversed itself. On its last and final decision in *this matter,* it first affirmed an order of the District Court permitting Petitioners to proceed to a rehearing in the reorganization proceeding before S.E.C. of their charges of fraud and conspiracy (November 12, 1953), and then reversed itself, on March 22, 1954 recalled its mandate and entered a new judgment expelling the Petitioners from any access to the federal courts or the S.E.C.—*a procedure which S.E.C. had suggested and volunteered in its brief before the Court of Appeals, and to which Petitioners consented.*

> Page 15: Indefensibly inaccurate and offending is the statement on this page that this petition involves an effort by these Petitioners to recover twenty-seven and one-half million dollars "on the basis of alleged claims which had accrued, if at all, prior to the reorganization."

Such a statement cannot be reconciled with the facts. Petitioners' claims accrued only at the moment of the final decree enforcing the reorganization, as the result of which the fraud and conspiracy was thus brought to consummation.

> Page 15: In the footnote on this page, the statement is made by counsel for S.E.C., appearing so valiantly, for reasons not stated, as champion of the Long Island Lighting Company, now completely out of its jurisdiction: "The Court will of course understand that Long Island in prior stages of this litigation denied the claims of fraud and that the Court on consideration of such claims has found them baseless."

This is completely untrue and is not supported by any decision of any Court or any part of any record.

POINT IV

Accuracy of statement and adherence to the facts and law require this Point in reply to the brief of the respondent, Long Island Lighting Company (the "Company"). The references are to the pages of the "Company's" brief.

> Page 3: "Since the Spring of 1952, these Petitioners on five occasions have attempted to persuade a federal court that fraud was involved in the reorganization proceedings. All these attempts have failed. Four of the failures were on the merits."

These petitioners have in no federal court been permitted to present their evidence of fraud by pleading, bill of particulars, testimony or deposition or to take the depositions of any of the defendants. Where and when and before whom? There has never been a decision which even purported to be on the merits. Where, when and by whom?

> Page 3: "Petitioners have had their day in court on the very claims tendered here and they have no constitutional right to a further attempt before a jury to vindicate these claims."

The petition itemizes twelve specifications of fraud and conspiracy. Where, when and before whom have petitioners been allowed even to particularize these charges, much less to offer testimony and documentary evidence thereof or to examine the defendants or any of them with regard thereto. What authority exists for the assertion that the petitioners having been denied in express terms any trial or hearing before a jury or otherwise "have no constitutional right to a *further* attempt before a jury to vindicate these claims."

> Page 4: What authority exists, certainly no applicable case is cited, for the assertion that "litigation (presumably the right to try issues of fact before a jury) may be relegated to a particular court."

This proceeding was conducted and decided by S.E.C.; no court heard any of the testimony or tried any of the issues. The District Court's only jurisdiction is to grant or deny an enforcement order—not even to modify it. The enormity of this contention, apparently seriously if not sincerely, advanced by the Company completely stultifies its later statement at Page 12 that "no new principles of law are involved; no great issues of Federal law are involved; no conflict of decisional law awaits resolution."

> Page 5: Despite the earlier statement of the Company's brief that all petitioners' claims of fraud have been heard and rejected "on the merits", we encounter this statement:
>
> "The matters not previously advanced could have been."

We have pointed out in our Petition that this is a physical impossibility. The fraud was not revealed until April 18-27, 1951 in hearings on fee applications before the S.E.C. after the proceeding had completely ended by the final order of the Court of Appeals, affirming the enforcement order, made and entered in June 1950.

> Page 6: The statement is made: "It should be noted that the question of jurisdiction, so petulantly urged here, has been dismissed by Judge Learned Hand as 'too trivial to justify discussion.' "

This, to our way of thinking, is a flagrant and indefensible prevarication for reasons set forth at pages 21 and 22 of the Petition, and, whatever it may signify, also as pointed out in the Petition at page 19, the same Judge in an opinion written eight years later says on this question of jurisdiction referring to June 1948:

> "* * * when the Committee was allowed to intervene and by that time we had decided that the SEC was paramount and the Supreme Court had refused to intervene. We may of course have been mistaken; but it should have appeared to Mr. Aron to the last degree unlikely that our ruling would not remain authoritative."

Apparently we have departed from Lincoln's principle that nothing is settled until it is settled right.

> Page 6: Factually the same characterization befits this statement of the Respondents' brief: "In each instance the claims were found to be without substance."

Earlier the statement is made that they have all been dismissed on the merits. We again ask "Where, when and by whom?" Petitioners have been denied completely any vestige of an opportunity to present any evidence of any of their charges of fraud. The Company, however, goes further in its inconsistency with prior statements: "The *remaining* matters raised by the Petition have either been presented *or* are irrelevant". When, where and by whom were they ruled irrelevant; when, where and by whom is their relevancy to be tested, if not in a court of law and equity? On this point we beseech this Court not to be deceived by the studied and heretofore successful tactic of the Respondents in making such statements, without citation of the record, as to what the record does and does not contain—a record weighing perhaps half a ton and covering eight years of continuous proceedings, thrust upon four overburdened judges.

Page 7: The contention on this page is disengenuous. The argument made by Mr. Kadane in defense of Mr. Kadane amounts to this: he has admittedly acted in two completely, even violently, conflicting positions in the same proceeding from 1944 to the present time, but he contends it was not until February 4, 1953 that such conduct was interdicted by S.E.C. (Cf. Last paragraph of Canons of Professional Ethics, No. 6).

Page 8: The *coup de grace* sought to be dealt by the Company's brief appears in the following:

> "It follows that no security holder could ever be prejudiced by reorganization proceedings under Sec. 11(e), *assuming such proceedings* to be lawful, since the Act requires he receive the fair equivalent of his claim."

We need only to underline, as we have, the words "assuming the such proceedings be lawful" to brush off this mighty effort. The as yet undisputed facts of this matter, stated under oath and never answered or denied, are that these proceedings under Section 11(e) were conceived in fraud, prosecuted by conspiracy, nursed by a former attorney for the S.E.C., who had the crafty caution to let *seven months* elapse between his resignation as Special Counsel for S.E.C. in this very proceeding to become general attorney and later general counsel in charge of the proceeding on behalf of the Company, being reorganized before S.E.C. since 1944.

Page 9: The statement made as to the lack of finality and effectiveness of the 1944 Recapitalization is completely and diametrically in conflict with the decision of the United States Court of Appeals, denying the original motion made by David K. Kadane, as special counsel of S.E.C., seeking to enjoin the Public Service Commission of New York from activating the 1944 Recapitalization, opinion by Judge Swan, reading as follows on pages 253, 254 of the 254th Fed. (2d):

"Prior to its inauguration, the stockholders of the appellee had voted in favor of a plan of recapitalization proposed by its management, and on February 29, 1944, pursuant to the requirements of the Stock Corporation Law, Cons. Laws c. 59 and the Public Service Law, Consol. Laws c. 48 of the State of New York, it was submitted to the Public Service Commission of New York. After extensive public hearings from March through September, the recapitalization plan was approved by the State Commission on December 14, 1944. *By law, that Commission is required to withhold approval unless it finds that the plan is in the interest of investors.* (284 N. Y. 626.) The appellee promptly filed its certificate of recapitalization, in the office of the Secretary of State of New York, in pursuance of the Stock Corporation Law. *The plan became effective on such filing.* (General Corporation Law, Cons. Laws, c. 23, section 8), *the rights of the stockholders under the corporate structure came to an end, trading in the old stock ceased on the New York Curb Exchange on December 16 and trading in the new stock commenced on December 18."* Italics supplied; cf. page 7, *supra.*

Page 10: This Court is more competent than counsel on either side to evaluate what Mr. Freeman said in 1925, the appositeness of the quotation and decisions cited. It will be recalled that in this very matter, the Court of Appeals expressly left open the question whether the plaintiffs could proceed by independent action for the fraud set forth in the motion to set aside the enforcement order (197 F. 2d 709, 710; Petition, p. 5).

Page 11: The most shocking misstatement in the Company's brief is that the Petitioners "participated fully at every stage." Again there are no reference to the thousands of pages of testimony on the hearings before S.E.C. and nothing to support the statement made, which is conclusively rebutted by the express language of the S.E.C. order permitting the Committee to intervene only to the extent of a "limited participation" which goes to the very heart of our Petition.

Page 12. Throwing all restraint to the winds and resorting to the *ad terrorem* the Company pleads that to grant this writ would be "to jeopardize the position of those who have had financial dealings with the Company in reliance on the finality of the reorganization decree." The Petitioners accept the finality of the reorganization decree; their action is premised on its finality. The decree is the successful consummation of the fraud and conspiracy they charge in their complaint and on which they seek only a fair trial. The trial of the issues raised by the complaint, never answered or denied, and a verdict and judgment thereon can no more or otherwise "jeopardize the position of those who have had financial dealings with the Company" than would a verdict and judgment in an action for negligence, if one of the Company's generating plants blew up because of negligent operation, affect its security holders or those who had financial dealings with the Company.

Finally, the opinion and the decision of the Court of Appeals below are in apparent conflict with the holding by the First Circuit in *Petition of Blatchley,* 157 F. 2d 894, where under similar circumstances—in a stockholders action alleging that the approval of S.E.C. to the reorganization of the New England Public Service Company had been obtained by fraud and conspiracy—that Court stated:

> "It is not at all clear to us that the injunction in its present terms would forbid the commencement and prosecution of the sort of suits Blatchley has in mind * * *. If the injunction in its present form forbids the institution of stockholders' suits seeking an accounting from the alleged wrongdoers, the District Court is at liberty to make an appropriate modification of the injunction. We think it may do so without a final adjudication, either by it or the Commission on the merits of the allegations of fraud. In the regular course, the merits of those charges would be tried out in the court or courts in which the subsequent suits against the alleged wrongdoers may be brought."

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

HAROLD G. ARON,
Attorney for Petitioners.

Office - Supreme Court, U. S.
FILED

AUG 2 1954

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 188

ENNIS M. NICHOLS, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and COMMON STOCKHOLDERS COMMITTEE of Long Island Lighting Company,
Petitioners,

against

LONG ISLAND LIGHTING COMPANY,
Respondent.

SECURITIES & EXCHANGE COMMISSION,
Respondent.

BRIEF FOR RESPONDENT, LONG ISLAND LIGHTING COMPANY, IN OPPOSITION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPEAL PRINTING CO. INC., 130 CEDAR ST., NEW YORK, WORTH 4-3033

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IN THE

Supreme Court of the United States

October Term, 1954

No. 188

Ennis M. Nichols, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and Common Stockholders Committee of Long Island Lighting Company,
Petitioners,

against

Long Island Lighting Company,
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Securities & Exchange Commission,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, LONG ISLAND LIGHTING COMPANY, IN OPPOSITION

Opinions Below

The opinion of the District Court is unreported and is set out in page 7 of the Petition. The opinions of the Court of Appeals for the Second Circuit (Pet.* 27-33; Pet. 36-37) are reported at 207 F. 2d 931 and 211 F. 2d 392.

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* Reference is to the page of the Petition where these opinions are set out.

Jurisdiction

Jurisdiction to review on petition for certiorari is conferred by 28 U.S.C. Sec. 1254(1).

Question Presented

The correctness of a judgment of the Court of Appeals for the Second Circuit which:

(a) affirmed an order of the District Court for the Eastern District of New York dismissing this action for damages in the amount of $27,500,000 based on an alleged fraudulent conspiracy to defeat certain rights of Petitioners as stockholders of Respondent Company's predecessor which resulted in a decree of consolidation and reorganization of Respondent (the Company), on the ground that the maintenance of the action constituted a collateral attack enjoined by said decree of consolidation and reorganization, and

(b) modified said order of dismissal to strike therefrom the following language: "without prejudice to any further proceedings which the Plaintiffs herein may desire to undertake, pursuant to this Court's reserved jurisdiction in said Civil Action No. 10,413 [the reorganization proceedings] to vacate or modify the order in the aforesaid action by reason of the allegations set forth in the complaint herein," on the ground of *res judicata.*

Statement

The background facts are adequately set forth in the opinion of the Court of Appeals (Pet. 27-33) reported at 207 F. 2d 931. After this opinion was rendered, Petitioners moved in the District Court for the Eastern District of New York, purportedly in this action, for an order requiring the SEC to receive evidence which

Petitioners would adduce in support of their allegations. This motion was dismissed and an oral request to amend the motion to regard it as having been made in the reorganization proceeding was denied. The memorandum of the District Court is unreported and is set out, along with the order thereon, in the Appendix hereto. No appeal was taken from said order, contrary to the statement contained on page 8 of the Petition.

Petitioners thereupon moved for an order amending or modifying the opinion of the Court of Appeals (Pet. 27-33). The clarifying opinion of the Court of Appeals (Pet. 36-37) followed.

In October, 1950, after this Court denied a petition for certiorari by these same Petitioners from the approval of the reorganization plan, that plan was consummated. Since the Spring of 1952, these Petitioners on five occasions have attempted to persuade a federal court that fraud was involved in the reorganization proceedings. All these attempts have failed. Four of the failures were on the merits.[1]

Argument

Petitioners find a denial of a claimed constitutional right to trial by jury resulting from the judgment of dismissal of the instant action. Their finding is predicated on their assertion that the Court below erred in concluding that the action is barred by principles of *res judicata* and because it is a forbidden collateral attack on a subsisting judicial decree. Obviously, if the matters alleged are *res judicata*, Petitioners have had their day in court on the very claims tendered here and they have no constitutional right to a further attempt before a jury to vindicate these claims. And, if this action is a collateral attack on the reorganization decree, no deprivation of rights results if Petitioners are not permitted to wage this attack, for it is well settled by prior decisions of this Court that litigation may constitutionally be relegated to a particular court, *Yakus* v. *United States,* 321 U. S. 414 (1944); *Lockerty* v. *Phillips,* 319 U. S. 182 (1943), and the legislative intent mirrored in the Public Utility Holding Company Act (the Holding Company Act) was to limit matters pertaining to reorganizations thereunder to a single reorganization court.[2] Injunctions made by reorganization courts acting under the powers granted them by the Holding Company Act in aid of their exclusive jurisdiction have been upheld. *In re United Gas Corp.,* 162 F. 2d 409 (3d Cir. 1947); *Okin* v. *Securities & Exchange Comm'n,* 161 F. 2d 978 (2d Cir. 1947); *see Toucey* v. *New York Life Insurance Co.,* 314 U. S. 118, 135 (1941).

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[1] See opinion reported in *In re Long Island Lighting Co.*, 197 F. 2d 709, which embraces two of the attempts, and the opinions below reported in 207 F. 2d 931 and 211 F. 2d 392.

In short, there are no constitutional issues of deprivation of the right to trial by jury presented to this Court on this Petition.

I

Should review be granted, this Court would make the prosaic determination of the correctness of a holding of *res judicata*—amply supported by even a cursory reading of the claims presented by these Petitioners at each stage of the reorganization proceedings and subsequent proceedings before the Court of Appeals, and of the judicial disposition of these claims. The matters not previously advanced could have been (Pet. 37). Even if true, or relevant, and they are neither, such claims are now barred. *Chicot County* v. *Baxter*, 308 U. S. 371 (1940); *In re Union League Club of Chicago*, 203 F. 2d 381 (7th Cir. 1953); *see Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U. S. 100, —, 74 S. Ct. 414, 415-416 (1954).

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[2] 15 U.S.C. Sec. 79k(e) provides that upon the application of the SEC for enforcement of a plan of reorganization "the court, after notice, and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of this section. The court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take *exclusive jurisdiction and possession of the company or companies and the assets thereof* * * *"

Petitioners advance numerous "claims of conspiracy and fraud" in support of their complaint. Cryptically they assert that they have been "permitted" to present only two of these claims in prior proceedings, without specifying which two (Pet. 10). The falsity of the assertion, as well as of the arithmetic, is readily demonstrable:

With respect to Petitioners' claims relating to depreciation reserves, see 89 F. Supp. 513, 522-523,[3] 183 F. 2d 45, 50[4] and 197 F. 2d 709, 710.[5] See also pages 8, 11 and 22-24 of their petition to this Court for certiorari to review the approval by the Court of Appeals of the reorganization plan of the Company.[6]

With respect to Petitioners' claims relating to Company earnings, see 89 F. Supp. 513, 523-526 and 183 F. 2d 45, 48-49, 51. See also pages 8, 10 and 18-22 of their petition to this Court for review of the reorganization plan.[7]

With respect to Petitioners' claims that the grounds for SEC jurisdiction "were on their face sheer fiction and pretense to the point of absurdity" (Pet. 14), see 89 F. Supp. 513, 518, 182 F. 2d 660, 669-671[8] and 183 F. 2d 45, 47-48. See also pages 9, 11-12 and 24-29 of their petition to this Court for review of the reorganization plan.[9] It should be noted that the question of jurisdiction, so petulantly urged here, has been dismissed by Judge Learned Hand as "too trivial to justify discussion." *Public Service Comm'n* v. *Securities & Exchange Comm'n,* 166 F. 2d 784 (2d Cir.), *cert. denied,* 334 U. S. 838 (1948). In any event, the jurisdiction point is no longer open. *Stoll* v. *Gottlieb,* 305 U. S. 165 (1938).

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[3] *In re Long Island Lighting Co.*

[4] *Common Stockholders Comm.* v. *Securities & Exchange Comm'n.*

[5] *In re Long Island Lighting Co.*

[6] *In re Long Island lighting Co.*, October Term, 1949, No. 220. Certiorari was denied. 340 U. S. 834 (1950).

[7] *Ibid.*

[8] *Halsted* v. *Securities & Exchange Comm'n.*

[9] *In re Long Island Lighting Co.*, October Term, 1949, No. 220. Certiorari was denied. 340 U. S. 834 (1950).

With respect to the claim that the class Petitioners purportedly represent was oppressed, see the full discussion in 182 F. 2d 660. See also 89 F. Supp. 513, 519, 183 F. 2d 45, 48 and pages 8, 9 and 22-24 of their petition to this Court for review of the reorganization plan.[10]

The foregoing citations show that elaborate attention was given in prior proceedings to the claims which form the core of Petitioners' complaint as it is amplified by Petitioners' supporting papers. In each instance the claims were found to be without substance. The remaining matters raised by the Petition have either been presented in prior proceedings or are irrelevant. With respect to Item k, Pet. 10, which is apparently a reference to an offer by Consolidated Edison Company of New York to exchange its debentures for securities held by the Company's stockholders, see 89 F. Supp. 513, 517; with respect to the alleged concealment of the results of the introduction of natural gas, see pages 18 and 19 of the petition to this Court for review of the reorganization plan;[11] with respect to the alleged concealment from the Company's stockholders of the existence of the reorganization proceedings, see Holding Company Act Release No. 6218, dated November 9, 1945 and SEC File No. 54-136 at pages 20-22, which is the transcript of hearing of December 11, 1945, and which shows that the Company complied with the requirement of said Release No. 6218 and notified its stockholders of the pendency of the reorganization proceedings. Similar notification was given at every step of the reorganization proceedings. The charge that Mr. Kadane's employment by the Company was in violation of SEC Release No. 3465[12] was first raised in Petitioners' reply brief in the Court of Appeals on their appeal from the dismissal of the action. It was first raised then because the Release was promulgated on February 4, 1953, a fact with Petitioners apparently do not deem relevant. Mr. Kadane's employment by the Company in 1946 obviously could not have been a violation of a Release issued seven years later. Furthermore, Mr. Kadane left the SEC at the end of February, 1946 and took employment with the Company in September, 1946 after the SEC had entered a minute stating that such employment would not be improper. Mr. Kadane was not involved in the reorganization on the Company's behalf until October of 1947 when in response to a specific request from the Company the SEC advised the Company that Mr. Kadane's participation would not be regarded as inappropriate.

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[10] *In re Long Island Lighting Co.,* October Term, 1949, No. 220. Certiorari was denied. 340 U. S. 834 (1950).

[11] *Ibid.*

For purposes of the present proceeding all of the foregoing claims may be accepted as correct, although they are not. Even if correct, they would not affect the conclusion that the action is barred by *res judicata.*

II

The touchstone of the present action is the allegation that Petitioners' rights under the 1944 plan were destroyed by a conspiracy which was effectuated through the plan of reorganization under the Holding Company Act. However, a plan of reorganization under this Act must be found "fair and equitable" by the SEC and by the enforcement court. As used in Section 11(e)[13] these words mean that each class of securities must receive under the plan the equivalent in investment value of all of its rights. *Otis & Co.* v. *Securities & Exchange Comm'n*, 323 U. S. 624 (1945); *Securities Exchange & Comm'n* v. *Central-Illinois Securities Corp.*, 338 U. S. 96 (1949). It follows that no security holder could ever be prejudiced by reorganization proceedings under Section 11(e), assuming such proceedings to be lawful, since the Act requires that he receive the fair equivalent of his claim.

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[12] This Release was issued under the Securities Act of 1933 and is identical with Holding Company Act Release No. 11696, Rule 6(a) of which provides: "No person shall appear in a representative capacity before the Commission in a particular matter if such person, or one participating with him in the particular matter, personally considered it or gained personal knowledge of the facts thereof while he was a member or employee of the Commission. As used in this paragraph, a single

Since security holders cannot be prejudiced by the existence of Section 11(e) proceedings, the asserted cause of action must be based on the premise that the SEC in 1949, and the courts in 1950, in determining whether the consolidation plan was fair and equitable did not give proper legal weight to the 1944 plan. Examination of the SEC opinion, Holding Company Act Release No. 9473, shows that the SEC fully considered the weight to be given this plan and assigned some weight to it,[14] as did the District Court, 89 F. Supp. 513, 526, and the Court of Appeals, 183 F. 2d 45, 50, which stated:

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investigation or formal proceeding, or both if they are related, shall be presumed to constitute a particular matter for at least two years irrespective of changes in the issue. However, in case of proceedings in which the issues change from time to time, such as proceedings involving compliance with Section 11 of the Public Utility Holding Company Act, this paragraph shall not be construed as prohibiting appearance in such a proceeding, more than two years after ceasing to be a member or employee of the Commission, unless it appears to the Commission that there is such identity of particular issues or pertinent facts as to make it likely that confidential information, derived while a member or employee of the Commission, would have continuing relevance to the proceeding, so as to make the participation therein by the former member or employee of the Commission unethical or prejudicial to the interests of the Commission."

[13] 15 U.S.C. Sec. 79k(e).

[14] The New York Public Service Commission has stated that the 1944 plan never became effective. *In re Long Island Lighting Co.*, 73 P.U.R. (N.S.) 266 (1947).

> "There is no merit in this contention. On commencement of the revocation proceeding in November, 1944 the jurisdiction of the Commission over Long Island attached. Any change in its capitalization thereafter was subject to review by the Commission and, even if effective under state law, could be disregarded by the Commission in a plan filed under Sec. 11(e), since what is 'fair and equitable' is a federal question."

We respectfully submit that these citations demonstrate that the various tribunals carefully considered the question of the legal weight which should be given to the 1944 plan in determining "fair and equitable" treatment for the common stockholders. Therefore, the total effect and outcome of the alleged conspiracy is no more than the bringing to the SEC of a reorganization plan which has finally been held to have given proper weight to the 1944 plan. Who suggested to the SEC that it exercise jurisdiction is irrelevant; the facts that it did exercise jurisdiction and approved a reorganization plan giving adequate weight to the 1944 plan are not diminished.

Since the reorganization plan gave proper weight to the 1944 plan, and the question whether it gave proper weight cannot now be relitigated, it does not matter who induced the SEC to take jurisdiction. The allegations that the Company conspired "to defeat the rights which were vested under the 1944 plan" cannot survive the final adjudication that the reorganization plan adequately compensated the common stockholders for all their rights including such rights as they had under the 1944 plan.

It is for this reason that the Company also contended below that the complaint stated no compensable claim, since Petitioners could not show damage resulting from the acts complained of. This contention was not passed upon.

III

Should review be granted, this Court would also be called upon to determine whether or not this action constitutes a forbidden collateral attack on prior proceedings. That this is a collateral attack can hardly be denied, for the effect of a recovery herein would be to disturb allocations made in the reorganization proceedings by enhancing the participations of these Petitioners to the detriment of all other classes of stockholders whose interests were recognized therein.[15] Furthermore, the nature of this action places it within the classical definition of a collateral attack. Thus, in 1 *Freeman, Judgments,* Sec. 314 (5th ed. 1925), the author states:

> "A still clearer instance of collateral impeachments is presented in those cases where a suit or action is brought to enforce some obligation or liability arising in the progress of the proceedings culminating in the judgment or incident thereto. The rule is further exemplified by attacks made upon a judgment in actions to enforce some personal liability based on the institution or prosecution of the proceedings in which the judgment was obtained or in the actual procuring of the judgment, as, for example, *an action for damages against the person obtaining the former judgment because of fraud in its procurement."* (p. 629) (emphasis added)

There is ample and time-honored authority for this proposition. See, *e.g., Chaloner* v. *Sherman,* 242 U. S. 455 (1917); *United Merchants and Mfrs.* v. *South Carolina El.*

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[15] The reorganization plan provided for the issuance of 3,149,696.6 shares of common stock with a book value of approximately $32,000,000 and no preferred stock. Since consummation of the plan, the Company has sold over $50,000,000 of additional common stock, $37,000,000 of preferred stock and $70,000,000 of mortgage bonds.

& G. Co., 113 F. Supp. 257 (W. D. S. C.), *aff'd*, 208 F. 2d 685 (4th Cir. 1953); *Fishman* v. *Alberts*, 321 Mass. 280, 72 N. E. 2d 513 (1947); *White* v. *Merritt*, 7 N. Y. 352 (1852); *Peck* v. *Woodbridge*, 3 Day 30 (Conn. 1808). And clearly this is such an instance.

That this collateral attack is forbidden is made manifest by a reading of the reorganization decree which enjoins "* * * any action interfering with, or tending to interfere with these proceedings * * * including the commencement or prosecution of any action * * * in any court * * *" (Pet. 31). Furthermore, as argued by the Company below, this action would not be maintainable even absent the injunction provisions of the reorganization decree in view of the principle, enunciated in the cases immediately above cited, that there can be no recovery of damages alleged to be due to fraud leading to the entry of a decree while that decree remains in effect. This rule is subject only to the qualification discussed in Section V, *infra*. As noted previously, these Petitioners' attempt to reopen the reorganization because of alleged fraud was unsuccessful on the merits. 197 F. 2d 709. The reorganization decree thus stands as a bar to this action.

IV

Petitioners rhetorically ask this Court whether they have been accorded due process of law if their rights as stockholders have been taken from them in an administrative proceeding where they had no *right* to be heard. Suffice to say, they had a statutory right to be heard before both the SEC and the Courts, they were heard before both, and they participated fully at every stage. Their vituperative attack (Pet. 23-25) on the conduct of the reorganization proceedings before the SEC cannot obscure the fact that these proceedings were reviewed by the courts and received judicial sanction in the face of the very same

attacks now made. Patently, this is another attempt, and a belated one, to secure review of the reorganization proceedings four years after this Court had denied such review. 340 U. S. 834.

In view of the lateness of the day, and of the considered opinions upholding the validity of the Public Utility Holding Company Act (*e.g., American Power & Light Co.* v. *Securities & Exchange Comm'n,* 329 U. S. 90 (1946); *North American Co.* v. *Securities & Exchange Comm'n,* 327 U. S. 686 (1946)), Petitioners' argument based on the Act's unconstitutionality will not be rebutted here.

V

Manifestly, the issues before this Court are narrow, and the farrago of objections to the judgment below present no reasonable basis for this Court's intervention; none but the litigants are affected by this judgment; no new principles of law are involved; no great issues of Federal law are involved; no conflict of decisional law awaits resolution. Petitioners attempt to erect such a conflict by claiming that the holding of the Court of Appeals that the action is a forbidden collateral attack conflicts with its holding in *Griffith* v. *Bank of New York,* 147 F. 2d 899 (2d Cir.), *cert. denied,* 325 U. S. 874 (1945). Petitioners ignore the fact that the prior reorganization proceedings, which were *in rem* proceedings, had for a purpose the resolution of the claims of various classes of securities holders *inter sese.* This resolution was accomplished, and the reorganization decree contained an injunction against collateral attack, thereby giving assurance of stability of internal structure to those dealing with the Company. Without such assurance new financing would have been difficult, if not impossible. To permit the instant action to be maintained would be to ignore the existing

injunction. The effect would be to jeopardize the position of those who have had financial dealings with the Company in reliance upon the finality of the reorganization decree. In the *Griffith* case it was held that a prior judgment was no bar to a collateral attack *in equity* if plaintiff could show that duress practiced in the prior proceeding prevented plaintiff from challenging the statements or conduct of her adversary during the course of that proceeding. The instant case differs, however, even disregarding the fact that there was no injunction against collateral attack present in the *Griffith* case. For here, as shown in Section I, *supra,* Petitioners have attempted several times, each time without success, to convince various courts that they were coerced during the reorganization proceedings. Since they were not coerced, and since they had adequate opportunity to make their case therein, the holding that this is a forbidden collateral attack in no way conflicts with the holding of the *Griffith* case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

David K. Kadane,
General Counsel for Respondent,
Long Island Lighting Company.

Bertram D. Moll,
of Counsel.

Dated: July 29, 1954.

APPENDIX

(Opinion of Inch, D.J., Dismissing Plaintiffs' Motion for Order Requiring SEC to Receive Evidence, etc.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

ENNIS M. NICHOLS, individually and on behalf of other stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and member of the Committee and the Common Stockholders Committee of Long Island Lighting Company, and Common Stockholders Committee of Long Island Lighting Company,
Plaintiffs,

vs.

LONG ISLAND LIGHTING COMPANY,
Defendant.

Civ. #13054

1. Motion for an order directing the Securities and Exchange Commission to hear before such Commission, such competent evidence and proof as may be offered by the plaintiffs, etc.

APPEARANCES:

HAROLD G. ARON, Esq., Attorney for Plaintiffs.

DAVID K. KADANE, Esq., General Counsel for Long Island Lighting Company, Queens Borough, etc., *et al.*, by BERTRAM D. MOLL, Esq., of Counsel.

SOLOMON FREEDMAN, Esq., Attorney for Securities and Exchange Commission.

(Opinion of Inch, D.J., Dismissing Plaintiffs' Motions for Order Requiring SEC to Receive Evidence, etc.)

This action was dismissed by an order of this Court dated January 22, 1953, and the Court of Appeals of this Circuit affirmed the order of dismissal on November 12, 1953. Consequently this motion for an order requiring the SEC to receive evidence in support of the allegations of the complaint herein, which has been dismissed, must likewise be dismissed.

On the argument, plaintiffs' counsel requested permission to amend these motion papers to indicate that this motion was being made in the consolidation proceeding (Civil Action No. 10413). However, in affirming the order of dismissal of this complaint, the Court of Appeals denied plaintiffs permission to proceed further on these claims in the consolidation proceeding. Accordingly, the motion to amend is denied.

Submit order.

Dated, December 24, 1953.

(Signed) Robert A. Inch,
U. S. J.

APPENDIX

(Order Denying Plaintiffs' Motions for Order Requiring SEC to Receive Evidence, etc., Dated January 19, 1954)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

A motion having been made by plaintiffs herein for an order directing the Securities and Exchange Commission to receive evidence in support of the allegations of the complaint herein and directing that Edward F. Barrett, an officer of defendant, submit to examination; and the said motion having duly come on to be heard before this Court, at a motion part thereof, held at the United States Court House for the Eastern District of New York, 271 Washington Street, Borough of Brooklyn, City and State of New York, on the 23rd day of December, 1953; and upon the argument thereof plaintiffs' counsel having requested permission to amend plaintiffs' motion papers to indicate that the aforesaid motion was being made in the consolidation proceeding (Civil Action No. 10413); and this Court having made and filed its memorandum herein dated December 24, 1953;

Now, upon all of the papers submitted on this motion, and the proceedings heretofore had herein as outlined in the said submitted papers, and upon the said memorandum dated December 24, 1953, it is

ORDERED that plaintiffs' motion for an order requiring the Securities and Exchange Commission to receive evidence in support of the allegations of the complaint herein and directing that Edward F. Barrett submit to examination be, and it hereby is dismissed; and it is further

ORDERED that plaintiffs' request for permission to amend its aforesaid motion to indicate that same was being made in Civil Action No. 10413 be, and it hereby is denied.

/s/ ROBERT A. INCH, U.S.D.J.
United States District Judge

January 19, 1954

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 188

ENNIS M. NICHOLS, INDIVIDUALLY AND ON BEHALF OF OTHER STOCKHOLDERS OF LONG ISLAND LIGHTING COMPANY SIMILARLY SITUATED, ETC., AND COMMON STOCKHOLDERS COMMITTEE OF LONG ISLAND LIGHTING COMPANY, PETITIONERS

v.

LONG ISLAND LIGHTING COMPANY AND SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of New York (R. 45a-46a) have not been reported. The opinion of the Court of Appeals (Pet. App. 37) is reported in 211 F. 2d 392.

JURISDICTION

The judgment of the Court of Appeals with respect to which the writ of certiorari is sought was entered on March 22, 1954 (Pet App. 40-41). The petition for rehearing, filed on April 1, 1954, was denied on April 7, 1954 (Pet. App. 42). The petition for a writ of certiorari was filed on July 3, 1954.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Where a plan of reorganization for a registered holding company has been approved by the Securities and Exchange Commission and enforced by the district court, and the enforcement order has been affirmed on appeal, is an independent action against the company for damages brought by stockholders who participated in the reorganization proceedings properly dismissed on the grounds that such action was barred by the district court's order enforcing the plan and that the issues raised have already been adjudicated in the reorganization proceedings?

STATUTE INVOLVED

The pertinent provisions of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U.S.C. 79a, *et seq.*) are:

Sec. 11 * * *

> (e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest

or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. * * *

Sec. 18 * * *

(f) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court

> of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this title.

STATEMENT

The case took the form of an action for damages on behalf of former common stockholders of Long Island Lighting Company ("Long Island"). The Securities and Exchange Commission moved to intervene in the district court (R. 33a) which motion was granted (R. 46a).

Long Island was at one time a registered holding company under the Act. Following consummation of the plan of reorganization, discussed hereafter, and certain other action by Long Island, it has ceased to be a holding company and its registration as such was terminated by the Commission pursuant tc Section 5 (d) of the Act. See *Long Island Lighting Co.,* Holding Company Act Release No. 10732 (Aug. 21, 1951).

In November 1949, the Commission approved a plan of reorganization with respect to Long Island pursuant to Section 11 (e) of the Act. The plan provided for the consolidation of Long Island with its principal subsidiaries, the assumption by the consolidated company of the outstanding indebtedness of the constituent companies, and the issuance of new common for distribution among various classses of stockholders, including a 5.7% participation to the common stockholders of Long Island. A common stockholders committee, of which Ennis M. Nichols, a petitioner herein, was a member, had been heard in opposition to the plan. See *Long Island Lighting Co.,* Holding Company Act Release Nos. 9473, 9510. The plan was approved by the district court on the basis of findings that it was appropriate to effectuate compliance with the corporate simplification requirements of Section 11 (b) (2) and was fair and equitable to the persons affected thereby. The court found the objections of the common stockholders committee to be without merit. See *In re Long Island Lighting Co.,* 89 F. Supp. 513 (E.D.N.Y.). The committee appealed, and the district court's order was affirmed *sub nom. Common Stockholders Committee, etc.* v. *S.E.C.,* 183 F. 2d 45 (C. A. 2), certiorari denied, 340 U. S. 834.

The order of the district court approving and enforcing the plan, which was entered on February 17, 1950 (Civil Action No. 10413), provided, among other things, that upon consummation of the plan (R. 35a-36a), "all rights, interests and claims of the stockholders of Long Island Lighting Company . . . shall cease and determine" except as provided for in the plan, and that—

> (10) Long Island Lighting Company, Queens Borough Gas and Electric Company and Nassau & Suffolk Lighting Company, and all their creditors and security holders, and all other persons be, and they are hereby, enjoined and restrained from doing any act or taking any action interfering with, or tending to interfere with, these proceedings or with the enforcement and carrying out of the Amended Plan or any part thereof or compliance with the Order of the Securities and Exchange Commission dated November 16, 1949, or this Order, including the commencement or prosecution of any action, suit or proceeding, at law or in equity, or under any statute, in any court or before any executive or administrative officer, commission or tribunal, other than such proceedings before the Commission or this Court as may be authorized by the Act or the Rules and Regulations promulgated thereunder, and such review, if any, in an appropriate Court of Appeals as may be provided by law.

Thereafter, on October 24, 1950, the plan was consummated, and the new common stock of the reorganized company was distributed in accordance with the plan, the old common stockholders of Long Island receiving 5.7% of the new common stock.

In April, 1952, the Common Stockholders Committee and Nichols petitioned the court below for relief on the ground that the order of the district court approving the plan and the order of affirmance were allegedly procured "under circumstances tantamount to fraud effected and committed by said Long Island Lighting Company upon the Securities and Exchange Commission, the Court below and this Court." The alleged fraud related to Long Island's representations in the reorganization proceeding regarding its depreciation reserve. Petitioners sought in the alternative (a) an order to set aside the order of affirmance; (b) a reopening of the proceeding and an inquiry by the Court of Appeals; and (c) authority to proceed in the district court by way of a bill of review. The court below denied the petition in its entirety on the ground that "the facts alleged in the petition do not show that fraud was practiced upon the Commission, the District Court or this court", and stated further: "Whether petitioners have a right to proceed by motion or independent action in the District Court without obtaining leave of this court is a matter upon which we express no opinion". *In re Long Island Lighting Co.*, 197 F. 2d 709 (C. A. 2).

On November 18, 1952, petitioner Nichols, individually and on behalf of other common stockholders "similarly situated", and the Committee, instituted an independent action against the reorganized company seeking to recover on behalf of the old common stockholders $27,500,000, as damages for the failure of the common stockholders to receive or retain the interest which allegedly they would have retained had it not been for "fraud" and "conspiracy" between the predecessor Long Island and certain preferred stockholders. The complaint demanded a jury trial (R. 2a-4a).

The so-called conspiracy is said to have arisen from the abandonment of a plan of recapitalization for Long Island referred to as "the 1944 plan",[1] devised by Long Island under New York Law, when Long Island, although a holding company as defined in Section 2(a)(7) of the Act, had been exempted from registration and regulation thereunder pursuant to Section 3(a)(1) of the Act.[2] Although the plan was prejudicial to the interests of Long Island's preferred stockholders, the New York Public Service Commission indicated that its power "to remedy this condition directly is nil", and pointedly referred to the extensive reorganization powers of the Securities and Exchange Commission with respect to registered holding companies under the 1935 Act.[3] Thereupon, on petition of certain preferred stockholders, the Securities and Exchange Commission instituted procedings to revoke Long Island's exemption under the Act, and in the meantime sought an injunction to restrain consummation of the 1944 plan.[4] The plan was never consummated; Long Island's exemption was revoked; no review of the order of revocation was sought by Long Island or by its stockholders. Long Island thereupon registered under the Act, and, as heretofore noted, subsequently submitted under Section 11(e) of the Act the plan of reorganization which the Commission, the District Court and the Court of Appeals found to be fair and equitable. It is upon this sequence of events that petitioners have superimposed their charges of alleged "fraud" and "conspiracy".

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[1] The details regarding this plan are set forth in the Commission's opinion revoking Long Island's exemption, *Long Island Lighting Co.*, 18 S. E. C. 717, 754-758 (1945).

[2] *Long Island Lighting Co.*, 1 S. E. C. 345 (1936). By its terms and pursuant to Section 3(c) of the Act, the order was expressly made revocable whenever the Commission should find "that the circumstances which gave rise to the issuance of such order no longer exist."

[3] For pertinent extracts of the views of the New York Commission, see *Long Island Lighting Co.*, 18 S. E. C. at 754, 755. See also Long Island's affidavit (R. 9a-10a).

The complaint alleges (R. 3a) as a matter of fact that under the 1944 plan Long Island had been recapitalized pursuant to New York law, although the New York Commission has indicated that the plan had not become effective.[5] The complaint further alleges that "defendant's predecessor was obligated and under a duty to respect the rights created" by the 1944 plan, but in lieu thereof "conspired with certain preferred stockholders * * * to defeat" those rights, and carried out the conspiracy (1) by inducing certain preferred stockholders to persuade the Securities and Exchange Commission to block consummation of the 1944 plan; (2) by failing to contest the revocation of the exemption; and (3) by submitting a plan under Section 11(e) of the act which did not recognize "the vested rights under the 1944 plan" (R. 3a-4a). The complaint then adds, without any supporting particulars, that the order approving the plan "was obtained by deception, intrigue, misrepresentation and concealment before the Securities and Exchange Commission and this Court". (R. 4a)[6].

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[4] For this litigation see *S. E. C.* v. *Long Island Lighting Co.*, 59 F. Supp. 610 (E.D. N.Y.), affirmed, 148 F. 2d 252 (C.A. 2), certiorari granted, 324 U. S. 837, vacated as moot, 325 U. S. 833. The Second Circuit has since repudiated its decision in that case. *West India Fruit & Steamship Co.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775, 779.

[5] *Long Island Lighting Co.*, 73 P. U. R. (N. S.) 266, 273 (1947).

In the proceeding upon the plan, the Common Stockholders Committee specifically raised the question regarding the status and effect of the 1944 plan upon the rights of Long Island's common stockholders under the "fair and equitable" standards of Section 11(e). The courts agreed that, for determining a fair allocation between Long Island's preferred and common stockholders, the "fair and equitable" standard of Section 11(e) was paramount and that it was incumbent upon the Commission to look behind the apparent or formal status of claims to the ultimate equities (89 F. Supp. at 526; 183 F. 2d at 49-50.) Both courts likewise rejected the argument that Long

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[6] It is apparent from the affidavit of counsel for petitioners that this general statement was intended to relitigate the merits of the plan. (R. 29a-31a)

Island was improperly subjected to the Act because the operations of the Long Island System were wholly intra-state (89 F. Supp. at 518-519; 183 F. 2d at 47-48).[7] The same issues are raised in the complaint herein.

In response to the "fraud" complaint, Long Island filed no answer but moved for summary judgment on the ground of res judicata (R. 5a-19a). The Commission moved for leave to intervene and urged dismissal on the ground that the action constituted an attack on the plan in violation of the district court's order enforcing the plan (R. 33a-37a). The district court granted the Commission's motion and dismissed the complaint, the order, dated January 22, 1953, reciting that such dismissal was "without prejudice to any further proceedings which plaintiff herein may desire to undertake, pursuant to this Court's reserved jurisdiction in said Civil Action No. 10,413, to vacate or modify the order in the aforesaid action by reason of the allegations set forth in the complaint herein" (R. 46a, 48a). Since the complaint was dismissed on the grounds urged by the Commission, the court denied Long Island's motion for summary judgment, "without prejudice to a renewal of same in any further suit on the claim set forth in the complaint" (R. 47a). Petitioners appealed from both orders (R. 49a-51a).

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[7] The Court of Appeals referred to a prior decision involving the reorganization of another of Long Island's one-time subsidiaries, in which Judge Learned Hand said regarding the same contention, "the constitutional question is too trivial to justify discussion," *Public Service Commission of New York* v. *S. E. C.*, 166 F. 2d 784, 788, certiorari denied, 334 U. S. 838.

The same issue was also raised unsuccessfully by the Committee in another appeal taken in the course of the reorganization proceeding with respect to Long Island. See *Halsted* v. *S. E. C.*, 182 F. 2d 660, 669-670 (C.A. D.C.), certiorari denied, 340 U. S. 834.

In the *Halsted* case, *supra*, the court affirmed the order of the Commission refusing the Committee authority to solicit funds from stockholders to finance its activities. This however does not deter petitioners from alleging in their affidavit that such inability to solicit funds is part of the alleged "conspiracy". (R. 29a)

In an opinion dated November 12, 1953, the court below agreed with the Commission and the district court that the district court's order enforcing the plan was a complete bar to collateral attack, and also stated that the action is subject to dismissal on the ground of res judicata. *Nichols, et el.* v. *Long Island Lighting Co. et al.,* 207 F. 2d 931 (C.A. 2) (Pet. App. 27-33). The court stated: "While the claims made here may sound in tort they are really the same claims heretofore litigated and determined by us against the plaintiffs." (Pet. App. 33). Its judgment of that date accordingly affirmed the district court's order of dismissal (Pet. App. 34-35).

Petitioners then moved in the independent action for an order directing the Commission to hold hearings on the charges of alleged fraud set forth in the complaint and thereafter requested permission to amend the motion papers to indicate that the motion was filed in the reorganization proceeding on the plan, so as to avoid the question of collateral attack. The district court denied the first motion since the action had been dismissed pursuant to the order of the Court of Appeals, dated November 12, 1953 and the mandate issued thereon. It denied the second motion, since the finding of Court of Appeals of res judicata was likewise a bar to a direct application in the reorganization proceeding on the basis of the same complaint.[8]

Petitioner did not appeal from the order of the district court, but on February 1, 1954, filed in the Court of Appeals a motion to amend its opinion and judgment of November 12, 1953 (Pet. App. 37). In its opinion, *per curiam,* dated March 22, 1954, the Court of Appeals stated that under its finding of res judicata, it should have ordered stricken that part of the district court's order which recited that its dismissal was "without prejudice" to any further proceeding on the complaint in the reorganization proceeding, *Nichols, et al.* v. *Long Island Lighting Co., et al.,* 211 F.

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[8] The memorandum, which is unreported, states as follows: This action was dismissed by an order of this Court dated January 22, 1953, and the Court of Appeals of this Circuit affirmed the order of dismissal on November 12, 1953. Consequently this motion for an order requiring the SEC to receive evidence in support of the allegations of the complaint herein, which has been dismissed, must likewise be dismissed.

On the argument, plaintiff's counsel requested permission to amend these motion papers to indicate that this motion was being made in the consolidation proceeding (Civil Action No. 10413). However, in affirming the order of dismissal of this complaint, the Court of Appeals denied plaintiffs permission to proceed further on these claims in the consolidation proceeding. Accordingly, the motion to amend is denied.

2d 392 (C.A. 2) (Pet. App. 36-37). Accordingly, the Court of Appeals on the same date vacated its judgment of November 12, 1953, and entered an order modifying the district court's order dismissing the complaint to the extent of striking therefrom the "without prejudice" clause, and, as thus modified, affirmed the district court's dismissal of the complaint (Pet. App. 38-41). A petition for rehearing was denied on April 7, 1954 (Pet. App. 42).

ARGUMENT

The amended judgment of the court below, entered on March 22, 1954, like the original judgment of November 12, 1953, affirmed the district court's order dismissing the complaint. The modification made by the amended judgment was intended solely to give full effect to the determinations made by the court below in its opinion of November 12, 1953. Insofar as it bars collateral attack on the district court's order enforcing the plan and its affirmance by the Court of Appeals, the amended judgment of the court below is in accord with Sections 11(e) and 18(f) of the Act. Nor does the modification made by the Court of Appeals deprive petitioners of any rights. It merely precludes them from relitigating issues previously determined against them. Such is the inevitable effect of the doctrine of *res judicata.*

1. The district court's order of February 17, 1950, expressly recites that upon consummation "all rights, interests and claims of the stockholders of Long Island Lighting Company", other

than as provided in the plan, "shall cease and determine", and enjoins the security holders from bringing any action at law or in equity which might interfere with the enforcement or carrying out of the plan or reorganization. It is hard to conceive a more palpable violation of this order than that involved in petitioners' efforts to obtain from the reorganized company $27,500,000 for the old stockholders of Long Island—in addition to what they had received under the plan—on the basis of alleged claims which had accrued, if at all, prior to the reorganization.[9]

2. It is common practice to include in enforcement orders an injunction against further litigation in other proceedings, *Okin* v. *S.E.C.*, 161 F. 2d 978, 980 (C.A. 2); *In re United Gas Corporation,* 162 F. 2d 409, 412 (C.A. 3). Indeed, Section 11(e) provides that the Commission may apply for enforcement of its order "in accordance with the provisions of subsection (f) of section 18" under which the type of injunction involved herein is authorized. *In re United Gas Corporation, supra.* Moreover, Section 11(e) provides that the enforcement court acts "as a court of equity" and is authorized to "take exclusive jurisdiction and possession" of the company and its assets

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[9] At various points in the petition reference is made to the fact that there has been "no denial" of the allegations of the complaint (Pet. 6) and to "undenied fraud" (Pet. 22). This Court will of course understand that Long Island has, in prior stages of this litigation, denied the claims of fraud and that the courts on consideration of such claims have found them baseless.

wherever located. See also *S.E.C.* v. *Central-Illinois Securities Corporation,* 338 U.S. 96, 125. The consequence of such exercise of jurisdiction is that the enforcement proceeding under Section 11(e) takes on the character of a proceeding in rem, *Okin* v. *S. E. C., supra;* and the propriety of an injunction against independent actions over the same res is well-established, *In re United Gas Corporation, supra; In re Electric Bond and Share Co.,* 73 F. Supp. 426, 451 (S.D. N.Y.). See also *Toucey* v. *New York Life Insurance Co.,* 314 U.S. 118, 134-136.

3. Aside from the prohibition of indirect attack on the reorganization plan, affirmance by the court below by reason of res judicata was clearly warranted on the basis of the facts alleged in the complaint, and the affidavits and the other documents submitted on behalf of Long Island and the petitioners (R. 2a-32a).[10] Indeed, this alternate determination was one which the court below was uniquely qualified to make. It was the court below that had considered the Commission's efforts to secure an injunction to prevent consummation of the 1944 plan (note 4, *supra,* p. 9); the merits of the plan of reorganization, including the jurisdictional and other contentions raised by the common stockholders committee (p. 5, *supra;* and the ill-

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[10] It may be noted that the doctrine of res judicata bars renewal of an attack even on the basis of jurisdiction or constitutionality. See *Stoll* v. *Gottlieb,* 305 U. S. 165; *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, rehearing denied, 309 U. S. 695.

founded charges of fraud presented by the committee to the court below in April of 1952 (p. 7, *supra.*) The court below concluded that petitioners did not present "any new claims of fraud" and that in the guise of fraud, the complaint presented "really the same claims heretofore litigated and determined by us against the plaintiffs" (Pet. App. 33).[11] In effect the court below was construing and applying its own prior judgments and mandates which it found had adjudicated the same issues between the same parties. By expressly ruling not only that the particular action was barred as a collateral attack enjoined by the decree but also that the particular claim was barred on the basis of *res judicata* so that it could not be relitigated by reopening the reorganization proceeding, the court, as is evident from its opinion (Pet. App. 33), was merely bringing to an end this long and quixotic litigation.[12]

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[11] As this Court held in *Hazel-Atlas Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, and as the court below recognized (197 F. 2d 709, 710), a judgment may be set aside where a petition to reopen brings forward a claim of fraud upon the court based upon matters not previously adjudicated.

[12] In the instant case the court below recalled its mandate issued upon its judgment of affirmance of November 12, 1953, and in the same term entered a new judgment of affirmance on March 22, 1954, to resolve some doubt or ambiguity. This is proper appellate procedure. *Mulhens & Kropff, Inc.* v. *Ferd. Muelhens, Inc.*, 48 F. 2d 206, 207 (C.A. 2); *Sutherland* v. *Norris*, 33 F. 2d 899 (C.A. 3).

CONCLUSION

The case was decided correctly by the court below. There is no conflict and there is no need for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

Simon E. Sobeloff,
Solicitor General.

William H. Timbers,
General Counsel,
Myron S. Issacs,
Associate General Counsel,
Aaron Levy,
Attorney,
Securities and Exchange Commission.

August, 1954.

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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1954
No. 188

ENNIS M. NICHOLS, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and COMMON STOCKHOLDERS COMMITTEE of Long Island Lighting Company,

Petitioners,

against

LONG ISLAND LIGHTING COMPANY,

Respondent.

SECURITIES & EXCHANGE COMMISSION,

Respondent.

PETITION FOR REHEARING ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HAROLD G. ARON,
Attorney for Petitioners.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3-2320
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Supreme Court of the United States

October Term, 1954

No. 188

Ennis M. Nichols, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and Common Stockholders Committee of Long Island Lighting Company,

Petitioners,

against

Long Island Lighting Company,

Respondent.

Securities & Exchange Commission,

Respondent.

PETITION FOR REHEARING ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

Come now the petitioners and present this petition for a rehearing on the petition for a writ of certiorari filed in this case.

Jurisdiction

The petition for certiorari was filed on July 3, 1954 and denied on October 14, 1954. This petition for rehearing is filed in accordance with the Rules of this Court. In accordance with Rule 58(2) this petition is sought to be confined to *intervening circumstances of substantial and controlling effect,* at least, such is the belief of counsel.

Reasons for Petition for Rehearing

Since the denial of the petition for certiorari herein, action has been begun by these plaintiffs, in the United States District Court for the Eastern District, through other counsel against numerous individuals and the estate of the former general counsel for the Long Island Lighting Company, who are or were directors and officers of the Long Island Lighting Company at the time of the perpetration of the fraud and conspiracy, alleged in the complaint herein and re-stated and amplified in the complaint in said action. The complaint therein demands a jury trial and damages of $50,000,000, the same being the estimated present value of common stock which the plaintiffs would have received, had such fraud and conspiracy not been consummated as the result of the approval by the Securities and Exchange Commission of a management plan of re-organization. Other and different counsel than the undersigned appear for the plaintiffs.

The institution of this action is the natural sequence of the denial by this Court of a writ of certiorari in the action against the Long Island Lighting Company.

In his brief before the United States Court of Appeals in 1952 on the appeal which resulted in the judgment of that court on March 22, 1954, which was the subject of the petition for certiorari, now denied by this Court, plaintiffs' counsel at page 6, made the following statement:

> "The action is for fraud and conspiracy. Had the appellants been less considerate of the individuals charged with participating therein and less realistic, in view of the amount of damages sought to be recovered, and had joined as defendants these individuals, which they had a perfect right to do, it seems fair to say that this appeal would not be here, for no possible theory could be conjured up on the part of counsel for the Long Island Lighting Company and the S. E. C. by which this action could be forced to trial under a regulatory statute before an administrative body, wherein the officials of the agency are prosecutors, triers of the fact, rulers on the admissibility of evidence, judge and jury, with the Courts powerless to modify its decisions."

To this might be added "*and before which no party however* interested or affected could appear in the proceeding and be heard without the consent of that agency and, as here, could have, at best, as a matter of grace, only a "limited participation", so named and proscribed by the SEC. And it is further apparent, that had individual directors and officers been named as defendants, the finding on which the Court of Appeals finally rested its dismissal of the action (see opinion of March 22, 1954, printed at page 36 of the Petition for Certiorari), namely *res judicata* would have been irrational, even if it had any law to support it, in view of the undisputed fact that evidence of the fraud and conspiracy was not discovered until long after the Court of Appeals had affirmed the enforcement order of the District Court.

In oral argument, in this protracted proceeding, now going back a decade, counsel has repeatedly pointed out the procedural problems of justly enforcing a judgment and finally ending in a representative action on behalf of 11,000 common stockholders against a large group of individual defendants some of whom in all probability had no actual notice or tortious participation in the fraud and conspiracy alleged.

In appellants' brief before the Court of Appeals, page 22, counsel pointed out that the defendant Long Island Lighting Company had never answered or denied the allegations of the complaint, alleging fraud and conspiracy and there said:

> "We are aware that this Court has closed its ears to our plea that the administrative proceeding before the S. E. C. violated every principle and mandate laid down by the United States Supreme Court, in opinions by Chief Justice Hughes (Morgan v. United States, 298 U. S. 468, 304 U. S. 1; Railroad Commission of California v. Pacific Gas and Electric Co., 302 U. S. 388); by Mr. Justice Brandeis (St. Joseph Stockyards Co. v. United States, 298 U. S. 38, 73); and by Mr. Justice Cardozo (Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio, 301 U. S. 292)—and that we must accept the finality of this Court's decision sanctioning what took place before the S. E. C. *as due process of law.* In this connection we refer to the study prepared for the Commonwealth Fund in 1942 by Professor Joseph B. Chamberlain and others, 'The Judicial Function in Administrative Agencies', at pages 193-207.
>
> "We do not understand, however, that this Court has gone so far as to say that where an admitted fraud has been accomplished by 'due process of law' in an administrative proceeding the injured persons have no remedy at law or in equity, and, in effect, repudiated its own reasoning in the Southern Pacific case (244 Fed. 63)."

In reply to respondents' briefs on this petition, appellants' counsel pointed out the apparent conflict between the First and Second Circuits in the decision here sought to be reviewed and Petition of Blatchley, 157 Fed. 2d 894.

In conclusion, we quote from Rule 19 of this Court—final clause of paragraph b; setting forth the reasons this Court will consider on the presentation of a petition for writs of certiorari:

> "Where a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure in a lower court as to call for the exercise of this court's power of supervision.

Respectfully submitted,

Harold G. Aron,
Attorney for Petitioners.

Certificate

I, Harold G. Aron, attorney for Petitioners Ennis M. Nichols, et al., does hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for purposes of delay.

Harold G. Aron,
Attorney for Petitioners.